

February 2009

COMMUTER RAIL

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



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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.

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.

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Abbreviations

AAR	Association of American Railroads
Amtrak	National Railroad Passenger Corporation
APTA	American Public Transportation Association
ARAA	Amtrak Reform and Accountability Act of 1997
DOT	Department of Transportation
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
NEC	Northeast Corridor
STB	Surface Transportation Board

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United States Government Accountability Office
Washington, DC 20548

February 24, 2009

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
House of Representatives

The Honorable John W. Olver
Chairman
Subcommittee on Transportation, Housing and
Urban Development, and Related Agencies
Committee on Appropriations
House of Representatives

The Honorable Kathy Castor
House of Representatives

The Honorable James P. McGovern
House of Representatives

Freight rail and passenger rail services are important to the nation's mobility and economy. Freight railroads play a critical role in the movement of freight throughout the United States, carrying over 40 percent of domestic intercity freight (as measured by ton-miles), including bulk commodities; intermodal freight (e.g., containers and trailers); and hazardous materials. Demand for freight rail service has increased over the last 25 years and is expected to continue growing in the coming decades. For example, according to Department of Transportation (DOT) estimates, freight rail tonnage will increase to 3.5 billion tons, or by about 88 percent, from 2002 to 2035.¹ As the demand for freight rail services increases across the country, demand for passenger rail services, including intercity passenger rail and commuter rail, is also growing.² For example, the National Railroad Passenger Corporation (Amtrak), the nation's intercity passenger rail provider, has reported 6 consecutive years of

¹U.S. Department of Transportation, *Freight Facts and Figures 2007*.

²Commuter 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). Commuter rail agencies are typically owned and operated by state and local governments.

growth in ridership, with almost 29 million passengers in fiscal year 2008. Similarly, commuter rail is an increasingly popular choice for communities as they look to different forms of public transportation for relief from highway congestion. Twenty-one commuter rail agencies now operate in communities across the country, and 5 more commuter rail systems are expected to initiate service within the next 5 years.

Both Amtrak and commuter rail agencies often share rights-of-way with each other and with freight railroads.³ Because Class I freight railroads own the majority of existing railroad rights-of-way in the United States, Amtrak and commuter rail agencies must often negotiate with freight railroads to purchase, lease, or pay to access their rights-of-way.⁴ Commuter rail agencies generally must also negotiate with Amtrak to use Amtrak-owned rights-of-way. As we have previously reported, negotiating agreements that govern the shared use of rights-of-way can be challenging, especially on issues such as liability and indemnity.⁵ Although the passenger rail and the freight rail industries maintain good safety records, mixing passenger and freight trains on the same rights-of-way entails certain risks, as the deadly September 2008 crash involving a Metrolink commuter rail train and a freight train in Chatsworth, California, illustrates. Consequently, as a condition for using their rights-of-way, freight railroads seek certain liability protections from the costs and risks associated with potential passenger rail accidents. For example, a freight railroad might require that the commuter rail agency contractually indemnify the railroad from any liability in the event of a passenger accident and procure a certain level of insurance coverage to guarantee its ability to pay the entire allocation of damages. Amtrak also sometimes

³Rights-of-way include the fixed infrastructure required for train operations, including tracks and signals.

⁴Class I freight railroads are the largest railroads, as defined by operating revenue, and account for the majority of U.S. freight rail activity. The Surface Transportation Board designates the class of railroad and defined Class I railroads as railroads with operating revenues of \$346.8 million or more in 2006. Currently, seven Class I freight railroads—CSX Transportation, BNSF Railway, Union Pacific Railroad Company, Norfolk Southern, Kansas City Southern Railway Company, Canadian National Railway Company, and Canadian Pacific Railway—are operating in the United States.

⁵Liability is the legal obligation to pay claims arising from injuries to people or damages to property. Indemnity is a contractual provision under which one party agrees to protect the other party against loss or damages that it may sustain in connection with the contract. Through an indemnity provision, the parties may allocate financial responsibility for claims. See, GAO, *Commuter Rail: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations*, GAO-04-240 (Washington, D.C.: Jan. 9, 2004).

requires certain liability protections when hosting commuter rail operations. Accepting such liability and indemnity terms can raise a number of issues for the commuter rail agencies. As a result, contract negotiations between commuter rail agencies and freight railroads can stall or fail.

Three federal agencies—the Federal Railroad Administration (FRA), the Surface Transportation Board (STB), and the Federal Transit Administration (FTA)—are responsible for different aspects of passenger rail and freight rail services 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.⁶ Freight railroads, Amtrak, and commuter rail agencies are subject to FRA regulations. 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. In addition, the Passenger Rail Investment and Improvement Act of 2008 authorizes STB to provide nonbinding mediation between public transportation authorities, including commuter rail agencies, and host carriers in the event of an impasse in negotiations regarding trackage use.⁷ Unlike FRA and STB, FTA is not principally a regulatory agency. Rather, FTA is the primary source of federal financing for locally planned, implemented, and operated transit capital investments. As a form of public transit, commuter rail projects are eligible for FTA funding.

You asked us to undertake a comprehensive study of the liability and indemnity provisions governing passenger and freight rail services. This report addresses the following questions:

- What are the characteristics of liability and indemnity provisions in agreements among passenger and freight railroads, and what are the resulting implications of those provisions?

⁶FRA exercises jurisdiction over all areas of railroad safety under title 49, chapter 201, of the *United States Code*.

⁷49 U.S.C. § 28502.

-
- How have federal and state courts and STB interpreted the contractual liability and indemnity provisions of passenger and freight railroad agreements?
 - What factors influence the negotiations of liability and indemnity provisions among passenger and freight railroads?
 - What are potential options for facilitating negotiations of liability and indemnity provisions among passenger and freight railroads?

To address these questions, we obtained information from all existing and proposed commuter rail agencies and Class I freight railroads through site visits or telephone interviews.⁸ Specifically, we conducted semistructured interviews with officials from the 21 existing commuter rail agencies, 5 proposed commuter rail agencies, and the 7 Class I freight railroads. We also visited 3 existing commuter rail agencies, 2 proposed commuter rail agencies, and 2 Class I freight railroads. We used a variety of criteria to select these entities for site visits, including the number of contracts each freight railroad maintains, data on the ridership levels of existing commuter rail agencies, and whether proposed commuter rail agencies plan to purchase or lease freight-owned rights-of-way. We also obtained and analyzed the liability and indemnity provisions in agreements between commuter rail agencies, Amtrak, and freight railroads.⁹ In some cases, a commuter rail agency could have more than one agreement with Amtrak or a freight railroad or could have agreements with multiple railroads if its service extends onto tracks owned by more than one railroad. We also interviewed Amtrak, FTA, and FRA officials; STB staff; as well as selected state departments of transportation officials, representatives from a variety of industry associations, and a law firm representative who has served as a consultant to commuter rail agencies. Additionally, we reviewed federal and state laws, STB decisions, and court cases related to liability and indemnity provisions.¹⁰ We conducted our work between July 2008 and February 2009. See appendix I for detailed information about our scope and methodology.

⁸For the purposes of this report, we define “proposed commuter rail agencies” as agencies that plan to initiate commuter rail service within the next 5 years.

⁹We obtained and reviewed agreements between commuter rail agencies and Amtrak, commuter rail agencies and Class I freight railroads, and Amtrak and freight railroads.

¹⁰The court cases and STB decisions that we reviewed are summarized in appendix IV.

Results in Brief

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 liability and indemnity provisions assign liability to a particular entity regardless of fault—that is, a commuter rail agency could be responsible for paying for certain claims associated with an accident caused by a freight railroad. The reverse is also true—a freight railroad could be responsible for certain claims associated with an accident caused by a commuter rail agency. For example, a freight railroad could indemnify a commuter rail agency by assuming liability for freight rail equipment and track maintenance, even if the commuter rail agency is solely responsible for causing an accident. In contrast, a fault-based agreement assigns responsibility for an incident to the party that caused the incident. Provisions in about one-third of the no-fault agreements exclude certain types of conduct—such as gross negligence, recklessness, or willful misconduct—from the agreement, while in some of the remaining agreements, provisions specifically allow for such conduct in the no-fault arrangement. In these instances, the commuter rail agency is responsible for certain claims from an accident that is caused, for example, by gross negligence or recklessness on the part of the freight railroad. In addition, the liability and indemnity provisions require that commuter rail agencies carry certain levels of insurance to guarantee their ability to pay for the entire allocation of damages. These levels of insurance range from \$75 million to \$500 million. Because commuter rail agencies are publicly subsidized, some liability and indemnity provisions can expose taxpayers as well as commuter rail agencies to significant costs. For example, officials from some proposed commuter rail agencies told us they anticipate spending a substantial portion of their operating budgets on insurance, with officials from one proposed commuter rail agency anticipating spending 20 percent of the agency’s operating budget on insurance premiums.

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.¹¹ However, the enforceability and appropriateness of indemnifying an entity for its own

¹¹Pub. L. No. 105-134, 111 Stat. 2570 (1997).

gross negligence and willful misconduct remain an issue. In addressing an accident involving Amtrak, a federal court of appeals ruled in 2008 that a provision in ARAA that authorizes a provider of passenger rail service to enter into contracts that allocate financial responsibility for claims preempted (superseded) a state law that prohibited indemnification in cases of negligence.¹² STB, however, based on its statutory authority to prescribe contract terms if Amtrak and freight railroads cannot agree on a contract, has held, when setting the terms of agreements between Amtrak and freight railroads, that it would be contrary to public policy (e.g., good government) to indemnify an agency against its own gross negligence or willful misconduct. Specifically, STB has held that it would be contrary to provisions in the federal government's rail transportation policy, which require STB, among other things, to promote a safe and efficient transportation system and operate facilities and equipment without detriment to public health and safety. In addition, some officials have questioned whether ARAA preempts state sovereign immunity provisions, which generally prevent a state from being sued, except to the extent the state allows.¹³ The 2008 federal court of appeals opinion is very recent, and it will take time to see how it is interpreted and applied to indemnity provisions in agreements between commuter rail agencies and freight railroads.

Several factors influence negotiations of liability and indemnity provisions among passenger and freight railroads, according to officials from commuter rail agencies, Amtrak, and freight railroads. First, the freight railroads' business perspective influences the negotiation's starting position between commuter rail agencies and freight railroads. Freight railroads are not required to share their infrastructure with commuter rail agencies, and freight railroad officials said they are unwilling to assume any additional risk from passenger rail service, noting that the additional

¹²The opinion by the U.S. Court of Appeals for the Second Circuit, entitled *O&G Industries v. National Railroad Passenger Corp.*, 537 F.3d 153 (2d Cir. 2008), *petition for cert. filed* (U.S. Jan. 14, 2009) (No. 08-895) found that section 28103(b) preempts state law, even if the contractual indemnification is for Amtrak's reckless conduct. The Second Circuit opinion concluded that Congress' intent in enacting section 28103(b) was to "supersede" the effect of a 1988 district court opinion holding that it was against District of Columbia public policy to enforce an Amtrak indemnity agreement for losses caused by Amtrak's gross negligence. See *O&G*, 537 F.3d at 166-67, citing *National Railroad Passenger Corp. v. Consolidated Rail Corp.*, 698 F. Supp. 951 (D.D.C. 1988), *vacated on other grounds*, 892 F.2d 1066 (D.C. Cir. 1990).

¹³However, a federal district court held in a January 2009 memorandum of decision that 49 U.S.C. § 28103(b) preempted Pennsylvania's sovereign immunity statute.

risk would not exist without (but for) the commuter rail service. In addition, other factors—including freight railroads' financial health, the level of awareness or concern about liability, and views on sufficient amounts of insurance—have influenced negotiations. For example, some freight railroad officials told us that they are requesting more insurance coverage for new commuter rail projects than what they had required in some past agreements. However, officials from two proposed commuter rail agencies told us that it could be challenging and costly to obtain insurance coverage for the amount of insurance the freight railroads are requiring them to obtain. Additionally, a variety of state laws can influence the liability and indemnity provisions to which commuter rail agencies can agree. For example, some state laws prohibit a public agency, such as a commuter rail agency, from agreeing to indemnify a private party. Statutes governing Amtrak also influence the negotiations of liability and indemnity provisions between Amtrak and freight railroads as well as between Amtrak and commuter rail agencies. Specifically, Amtrak officials noted that because Amtrak is prohibited from cross-subsidizing commuter rail agencies and freight railroads on the Northeast Corridor (NEC), Amtrak cannot assume additional liability for these parties in its agreements for shared use of infrastructure.

Commuter rail agency, Amtrak, and freight railroad officials identified several options for facilitating negotiations of liability and indemnity provisions, including changing existing legislation, exploring alternatives to traditional commercial insurance, providing commuter rail agencies with more leverage in negotiations, and separating passenger and freight traffic. For example, although ARAA addressed many liability concerns, some commuter rail agency and freight railroad officials have questioned whether ARAA's liability cap applies to commuter rail agencies and have expressed concern that ARAA does not cover third-party claims. As a result, commuter rail agency and freight railroad officials suggested (1) amending ARAA to clarify that the \$200 million liability cap applies to commuter rail agencies and (2) expanding the scope of the liability cap to include third-party claims as a way to reduce the cost of insurance. In addition, commuter rail agency, Amtrak, and freight railroad officials identified alternatives to commercial insurance options, such as pooled insurance programs, that could increase the availability and affordability of insurance coverage as well as provide a mechanism to ensure that claims are paid to those involved in a high-cost incident. Some commuter rail agency officials also identified options that could improve their leverage in negotiations with freight railroads, such as providing commuter rail agencies with statutory access to freight-owned infrastructure. Finally, a few commuter rail agency and freight railroad

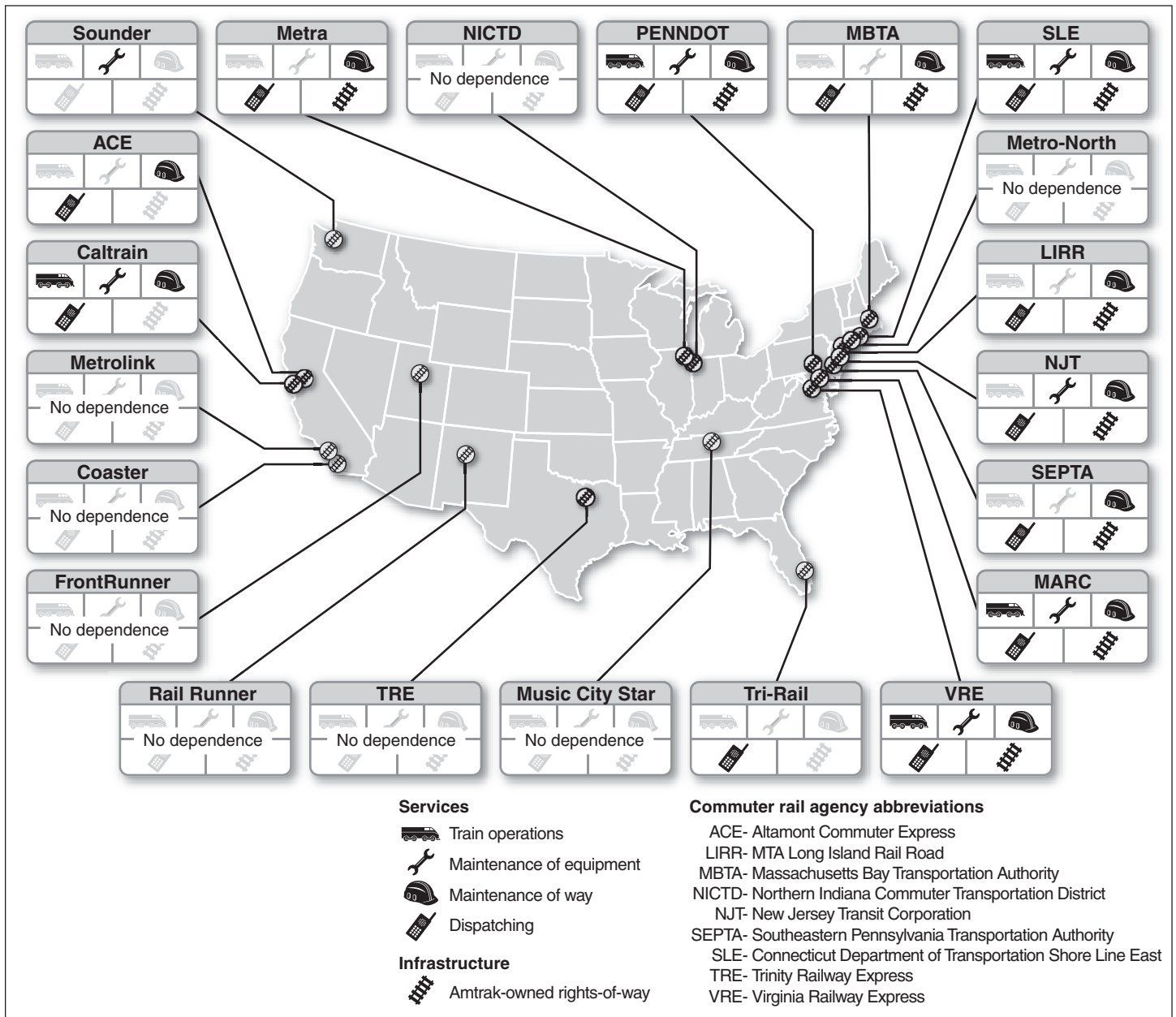
officials identified separating passenger and freight infrastructure as an ideal, but costly, option for eliminating exposure to liability risk.

Although we make no recommendations to DOT, STB, or Amtrak in this report, we provided these entities with a draft copy for review and comment. Amtrak provided technical comments, which we incorporated where appropriate. DOT and STB had no comments on the draft report.

Background

Most commuter rail agencies use rights-of-way that are owned by Amtrak or freight railroads for at least some portion of their operations. Specifically, 9 commuter rail agencies operate over Amtrak-owned rights-of-way. Twelve commuter rail agencies operate over rights-of-way owned by freight railroads. In addition, most commuter rail agencies rely on Amtrak and freight railroads for some level and type of service, including the operation of commuter trains; maintenance of equipment (i.e., locomotives and train cars); maintenance of way (i.e., track and related infrastructure); and train dispatching. Specifically, 13 commuter rail agencies rely on Amtrak for some type of service. Fourteen commuter rail agencies rely on freight railroads for some type of service. (See figs. 1 and 2 for an overview of these relationships.)

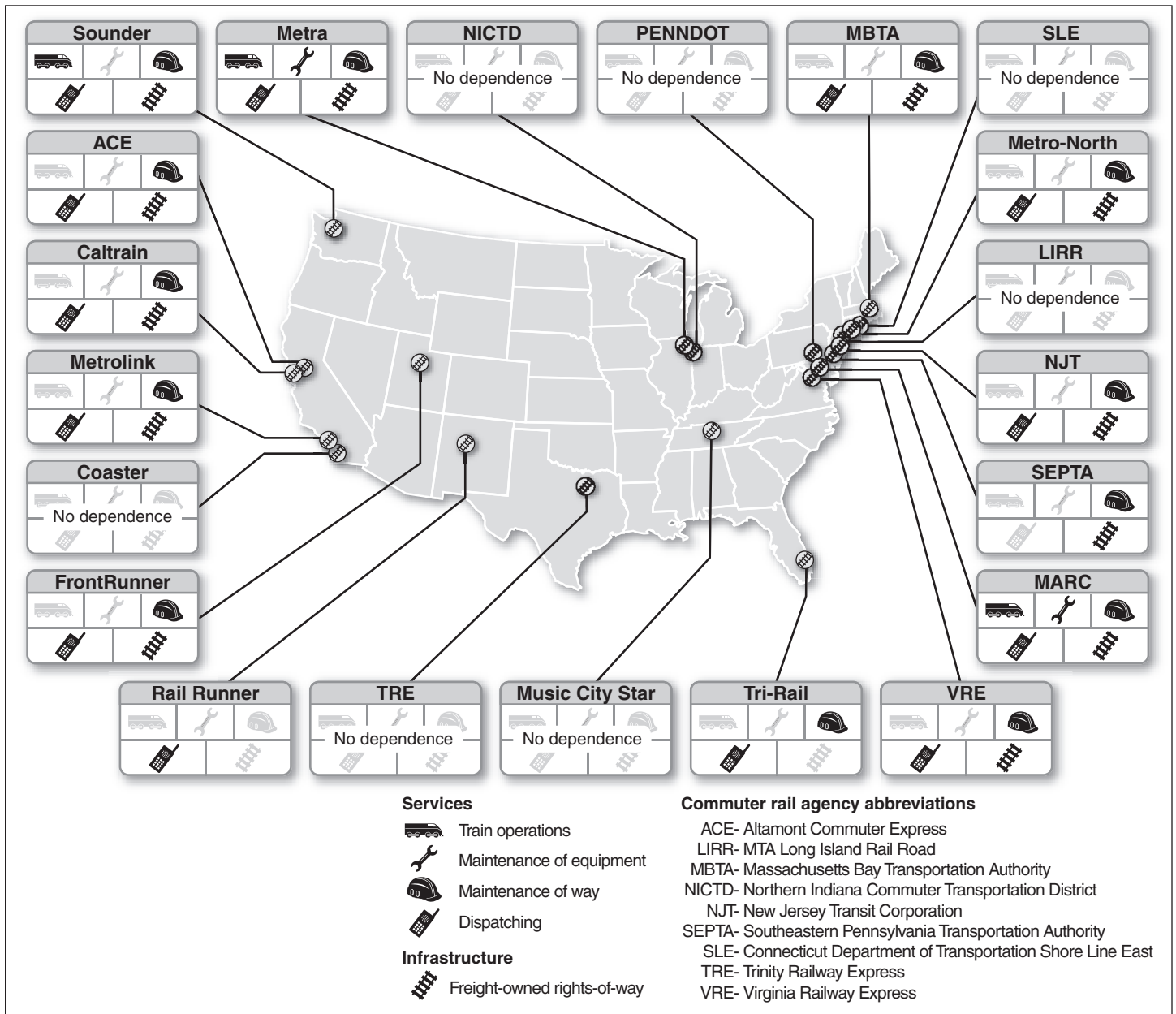
Figure 1: Overview of Commuter Rail Agency Reliance on Amtrak for Rights-of-Way and Services



Sources: GAO; MapArt (map).

Note: This figure does not include Amtrak-owned or -operated stations and platforms or other services, such as traction power, ticketing, or security services provided by Amtrak to commuter rail agencies. For information about those relationships, see GAO, *Commuter Rail: Commuter Rail Issues Should Be Considered in Debate over Amtrak*, GAO-06-470 (Washington, D.C.: Apr. 21, 2006). Also, the grayed-out icons in this figure indicate that these services or infrastructure are not provided to the commuter rail agency by Amtrak.

Figure 2: Overview of Commuter Rail Agency Reliance on Freight Railroads for Rights-of-Way and Services



Sources: GAO; MapArt (map).

Note: The grayed-out icons in this figure indicate that these services or infrastructure are not provided to the commuter rail agency by a freight railroad.

Historically, America's rail corridors have been used for both freight and passenger purposes. At one time, private railroads operated both passenger and freight services. In general, freight services were more profitable, but federal law required the private railroads to maintain their passenger service. However, by the 1970s, U.S. 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 and relieve the existing railroads of the requirement to provide unprofitable passenger service.¹⁴ In return, Amtrak gained the statutory right to operate over tracks owned by freight railroads.¹⁵ (See fig. 3.) Specifically, federal law requires freight railroads to give Amtrak trains priority access and to charge Amtrak an incremental cost—rather than the fully allocated cost—associated with the use of their tracks.¹⁶ Freight railroads also provide dispatching and maintenance-of-way services for Amtrak trains operating on their tracks.

¹⁴Pub. L. No. 91-518, 84 Stat. 1327 (1970).

¹⁵Amtrak operates over 95 percent of its 22,000-mile network on freight railroad tracks and owns about 655 route miles of track, primarily on the NEC between Boston, Massachusetts, and Washington, D.C. In fiscal year 2001, an average of 38 freight trains used the NEC each day.

¹⁶49 U.S.C. § 24308(a)(2)(B), (c).

Figure 3: Amtrak Network, by Track Ownership



Source: Amtrak.

Unlike Amtrak, commuter rail agencies do not possess statutory rights of access to freight railroads' tracks and generally do not possess statutory rights of access to Amtrak's tracks. Since commuter rail agencies typically operate on infrastructure owned by another entity, commuter rail agencies must negotiate with the owner to purchase, lease, or pay to access the owner's rights-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.¹⁷ These agreements can also vary by the parties involved, the location, and the structure of the agreement. For example, one commuter rail agency may

¹⁷The shared-use agreement documents how the rights-of-way will be operated—for example, it will outline the agreed-upon dispatching rules.

have separate contracts with Amtrak for services, infrastructure access, and capital investment, whereas another commuter rail agency might have one contract with Amtrak that bundles several services and access fees together in a fixed price. Similarly, one commuter rail agency may have an agreement with a freight railroad for various bundled services, while another commuter rail agency may have contracts with more than one freight railroad because its service extends onto tracks shared with more than one freight railroad.¹⁸ The contents of these agreements also may vary, but they are likely to address a number of important issues, including liability and indemnity provisions that allocate responsibility for risk in the event of an accident. However, these provisions cannot be considered in isolation because they are negotiated in the context of broader negotiations for the shared use of infrastructure that address train dispatching, maintenance of rights-of-way, capital improvements, and access fees. Hence, the agreements govern how the two parties operate on the rights-of-way they share. The period of time covered by the agreements and the amount of time required to negotiate the agreements also vary. For example, some commuter rail agencies have reached agreement with Amtrak or freight railroads within months, while other commuter rail agencies have negotiated with Amtrak or freight railroads over a period of years. Although Amtrak has statutory access rights to freight-owned rights-of-way, Amtrak must still negotiate the terms and conditions of this access.

In 1997, Congress enacted ARAA in response to concerns from freight railroads, commuter rail agencies, and Amtrak about the liability issue and the difficulties the parties were having in negotiating the shared use of freight railroads' rights-of-way, and a 1987 district court decision that addressed a catastrophic accident between an Amtrak train and a Conrail train. Section 161 of ARAA limits the overall damages from passenger claims from a single rail accident to \$200 million and also authorizes the providers of passenger rail transportation to enter into contracts allocating financial responsibility for claims.¹⁹ In enacting this legislation, Congress intended to facilitate agreements on the shared use of the freight railroads' rights-of-way.

¹⁸For example, the Northeast Illinois Regional Commuter Railroad Corporation, which serves the Chicago area, operates on shared rights-of-way with six Class I freight railroads and Amtrak and has separate agreements governing each of these relationships.

¹⁹Pub. L. No. 105-134, title I, § 161 (1997), *codified at* 49 U.S.C. § 28103.

Liability and Indemnity Provisions in Agreements Differ, but Commuter Rail Agencies Generally Assume Most of the Financial Risk for Their Operations

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 liability and indemnity provisions assign liability to an entity regardless of fault—that is, a commuter rail agency could be responsible for paying for certain claims associated with an accident caused by a freight railroad. The reverse is also true—freight railroads are sometimes responsible for certain claims associated with accidents caused by commuter rail agencies. These types of agreements are referred to as no-fault agreements. In addition, about one-third of these no-fault agreements exclude certain types of conduct, such as gross negligence, recklessness, or willful misconduct, from the agreements. Some of the remaining no-fault agreements specifically allow for such conduct, that is, the commuter rail agency is still responsible for certain claims caused by, for example, the gross negligence or recklessness of a freight railroad. The liability and indemnity provisions also require that commuter rail agencies carry certain levels of insurance to guarantee their ability to pay for the entire allocation of damages.

Liability and Indemnity Provisions of Passenger Rail Agreements Differ in their Allocation of Financial Responsibility

Although liability and indemnity provisions in agreements between commuter rail agencies and freight railroads differ, commuter rail agencies generally assume most of the financial risk for commuter operations.²⁰ With two exceptions, liability and indemnity agreements between commuter rail agencies and freight railroads are primarily no-fault arrangements—that is, responsibility for specific liability in any incident is assigned to a particular entity, regardless of fault. For example, in a no-fault agreement, a commuter rail agency might indemnify a freight railroad by assuming liability for commuter equipment damage and passenger injury in a derailment, regardless of whether the freight railroad’s maintenance of the tracks could be blamed for a given incident. Similarly, a freight railroad could indemnify a commuter rail agency by assuming liability for freight rail equipment and track maintenance, even if the commuter rail agency was solely responsible for causing an accident. In contrast, a fault-based agreement assigns responsibility for an incident to the party that caused the incident. Of the 33 commuter rail agency and freight railroad agreements we reviewed, 21 were no fault, 10 contained a

²⁰We only analyzed agreements between commuter rail agencies and Class I freight railroads and did not obtain information from the few short-line railroads that have agreements with commuter rail agencies.

combination of no-fault and fault provisions, and 2 were premised on a fault-based allocation of risk.²¹

Although most of the agreements between commuter rail agencies and freight railroads are no-fault arrangements, the liability and indemnity provisions vary regarding the type of conduct allowed. For example, 9 of the 31 agreements with all or some no-fault provisions explicitly exclude certain types of conduct from the no-fault arrangement.²² Excluded conduct is any type of conduct specifically identified in the agreement as conduct beyond simple negligence and can be defined in a number of ways, including willful and wanton misconduct, gross negligence, or conduct that might result in punitive damages.²³ For example, 1 agreement specifically excludes conduct that is taken with conscious disregard for or indifference to the property or safety or welfare of others. Another 10 of the 31 agreements with all or some no-fault provisions, in contrast, explicitly include conduct that exceeds simple negligence as covered under the no-fault provisions.²⁴ For example, 1 agreement explicitly states that the indemnification agreement includes coverage for punitive damages, or damages that are caused by the reckless or willful acts of a party, while another explicitly states that the parties agree to indemnify each other even if a train engineer in an incident is using alcohol or drugs. Finally, the remaining 12 agreements are silent on excluded conduct, and discuss indemnification of negligence without explicit regard to its degree. Often, in these cases, the degree of negligence will depend on state law,

²¹These agreements are based on the number of distinct liability and indemnity agreements between a commuter rail agency and a freight railroad. Therefore, if 2 entities have multiple contracts with the same liability and indemnity provisions, they are counted as a single agreement.

²²This includes an agreement in which the liability and indemnity provisions exclude certain conduct for liability up to \$5 million and include it for liability above \$5 million.

²³Punitive damages are damages awarded in a lawsuit in addition to actual damages when the defendant acted with recklessness, malice, or deceit, and are assessed to penalize the wrongdoer or make an example to others.

²⁴This includes an agreement in which the liability and indemnity provisions exclude certain conduct for liability up to \$5 million and include it for liability above \$5 million.

and a determination concerning the enforceability of the provision may require litigation.²⁵

Freight railroads often set a requirement for a certain level of indemnification in the agreements and corresponding insurance requirements to ensure that the commuter rail agency will have the resources to pay for claims. The required level of insurance in existing commuter rail agency and freight railroad agreements ranges from \$75 million to \$500 million. Agreements vary on the exact requirements for insurance, such as what level of liability can be absorbed by the commuter rail agency—referred to as a self-insured retention—before the railroad must use commercial insurance. For example, some agreements that we analyzed set the level at which the commuter rail agency must purchase insurance for risk at above \$5 million, while other agreements set the level at \$1 million. Twelve of the 33 agreements between commuter rail agencies and freight railroads are silent on the exact level of insurance required. Appendix II contains a table summarizing the apportionment of liability in commuter and freight rail agreements.

Similar to the agreements with freight railroads, commuter rail agencies' agreements with Amtrak also are generally no fault. Specifically, 14 of the 17 agreements we reviewed between commuter rail agencies and Amtrak allocate liability on a no-fault basis, while 2 contain a combination of fault-based and no-fault provisions. The remaining agreement is fault-based. Regarding excluded conduct, 8 of the 17 agreements explicitly exclude certain conduct; the remaining agreements are silent concerning whether any conduct is excluded. Amtrak also sometimes requires certain levels of indemnification and corresponding levels of insurance to ensure that the

²⁵For example, Massachusetts case law states that it is against public policy to indemnify for gross negligence. A Massachusetts court recently held that provisions in a 1985 agreement that indemnified a freight railroad against all liability were unenforceable based on Massachusetts common law, to the extent the contractual provisions indemnified the freight railroad against its own gross negligence or reckless or intentional conduct. *See Massachusetts Bay Transportation Authority and Massachusetts Bay Commuter Railroad Co. v. CSX Transportation Inc. and Cohenno Inc.* (Super. Ct. Civ. Action No. 2008-1762-BLS1) (Memorandum and Order on Defendant CSX Transportation, Inc.'s Motions to Dismiss).

commuter rail agency will have the resources to pay for claims.²⁶ Appendix III contains a table summarizing the apportionment of liability in commuter rail agency and Amtrak agreements.

Amtrak's agreements with Class I freight railroads are also generally no-fault arrangements.²⁷ In addition, these agreements are generally silent on excluded conduct. Furthermore, all of Amtrak's agreements with freight railroads are silent on the amount of insurance Amtrak must carry to use freight-owned rights-of-way. ARAA requires Amtrak to maintain a minimum coverage for claims through insurance or self-insurance of least \$200 million per accident.²⁸ However, Amtrak officials stated that Amtrak carries more insurance than is required by this statute.

Freight railroad, commuter rail agency, and Amtrak officials told us that no-fault agreements are the easiest way to settle liability claims because they avoid the need for additional litigation to try to ascertain blame. Officials in Florida, for example, said a fault-based agreement would be much more expensive than a no-fault agreement because of the costs of investigating accidents. These officials said that a no-fault agreement was the best way to compensate litigants quickly. Furthermore, officials at a freight railroad said that an accident can have multiple causes and an investigation may not settle which party was at fault; therefore, a fault-based approach can result in disputes between commuter rail agencies and freight railroads over which party is responsible for paying for claims. These officials also said that contrary to some views, passenger and freight railroads have strong incentives to operate safely, even if they may not be liable for some accidents that they cause. Finally, Amtrak and freight railroad officials noted that no-fault agreements are fairly standard across the industry, and that these agreements are similar to agreements freight railroads use for access to each other's infrastructure.

²⁶In addition, insurance coverage may protect the indemnified party, even if the conduct itself cannot be indemnified. For example, a commuter rail operator agreed to indemnify Amtrak for any liability, except that which was caused by the gross negligence of Amtrak. A federal district court held that while an arbitration panel found Amtrak's actions to be grossly negligent, the commuter rail operator was responsible for providing Amtrak with the insurance coverage it had purchased in the agreement. *See Maryland Transit Administration v. National Railroad Passenger Corp.*, 372 F. Supp. 2d 478 (D. Md. 2005).

²⁷When freight railroads access Amtrak infrastructure, 12 of Amtrak's 13 agreements for hosting freight railroads are no fault.

²⁸49 U.S.C. § 28103(c).

Liability and Indemnity Provisions Have Cost Implications for Commuter Rail Agencies and Taxpayers

The liability and indemnity provisions in commuter rail agency agreements with freight railroads have cost implications because premiums vary with the levels of insurance required. Eleven commuter rail agencies reported paying from \$700,000 to \$5 million in insurance premiums, representing less than 1 percent and up to about 15 percent of commuter rail agencies' operating budgets.²⁹ Newer and smaller (as defined by ridership) commuter rail agencies typically spend more of their operating budgets on insurance premiums, in part because they do not have an established claims record, which factors into the premiums that a commuter rail agency must pay to cover its potential risk. Officials at proposed commuter rail agencies told us that they anticipated spending a substantial portion of their operating budgets on insurance. For example, officials at a proposed commuter rail agency anticipated spending more than 20 percent of their operating budget on insurance premiums. However, these premiums could decrease once the commuter rail agency has an established claims record, particularly if the commuter rail agency has no accidents over several years of service. Because commuter rail agencies are publicly subsidized, the premium costs for commuter rail agencies also represent a cost to taxpayers. Furthermore, the potential for high premium costs may impede or stop the development of new or expanded commuter rail services, according to commuter rail agency officials.

According to commuter rail agencies officials, certain liability and indemnity provisions expose commuter rail agencies to significant risks and, therefore, to potential costs. Although no-fault liability agreements are the norm, most assign more liability to commuter rail agencies than to freight railroads. Specifically, of the 31 agreements with all or some no-fault provisions we analyzed, 13 assign all liability for passengers to the commuter rail agencies and 7 assign all liability for passengers, as well as all liability for freight equipment, employees, and third parties, to the commuter rail agencies. In the remaining 11 agreements, freight railroads could be responsible for assuming some liability for passenger claims resulting from a collision.

²⁹Only 11 commuter rail agencies were able to provide information on the insurance premiums for their commuter rail operations. The primary reason the other commuter rail agencies could not provide this information is that they are part of a transit agency that operates other modes of transit, such as light rail or bus services, and the transit agency obtains commercial insurance to cover all of their services. As a result, the cost of insuring the commuter rail service could not be disaggregated from the other services. In addition, some commuter rail agencies do not have commercial insurance or have not yet obtained insurance for their proposed service.

When accidents do occur, commuter rail agencies use both their self-insured retention and commercial insurance to pay for claims. Similar to the deductible on individual insurance policies, the self-insured retention is the amount specified in the liability insurance policy that the commuter rail agency must pay before the insurance company pays for claims. For example, a commuter rail agency with a \$2 million self-insured retention must pay for all claims that are \$2 million or less, while claims above \$2 million would be covered by the insurance company. In most cases, the self-insured retention is per incident, that is, a commuter rail agency would pay each time a claim fell within the self-insured retention, which can be costly if there are many such claims in a given period. However, in most cases, these types of claims are fairly predictable for commuter rail agencies that have an established loss record, allowing the agencies to better plan and budget for costs they are likely to incur. Although most commuter rail agencies have commercial insurance policies to cover claims from a potentially catastrophic incident, most commuter rail agencies stated that they had never exceeded their self-insured retention and, thus, had never filed a claim with an insurer.³⁰

Federal Statutes, STB Decisions, and Federal Court Decisions Are Instructive in Interpreting Liability and Indemnity Provisions, but Questions Remain

ARAA capped liability for damages and addressed concerns about the enforceability of contractually negotiated indemnity provisions.³¹ Some railroad officials question, however, whether the act applies to commuter rail agencies and the types of contractually negotiated conduct that are enforceable. As a result, some freight railroads are hesitant to rely on the \$200 million cap on passenger claims when negotiating insurance requirements with commuter rail agencies.

³⁰ Claims resulting from the recent Metrolink accident have not yet been determined, but could exceed the self-insured retention carried by the Southern California Regional Rail Authority.

³¹ The liability provisions set forth in ARAA are contained in section 161. All references to ARAA that we make in this report refer to section 161.

ARAA Addresses Many Liability Concerns, but Railroad Officials Question the Applicability of the Statute's Liability Cap

ARAA introduced tort³² reform measures that limit the overall damages for passenger claims to \$200 million, including punitive damages to the extent permitted by state law, against all defendants arising from a single accident or incident. ARAA also authorizes providers of passenger rail transportation to enter into contracts allocating financial responsibility for claims. Congress introduced these measures in 1997 in response to concerns from freight railroads, commuter rail agencies, and Amtrak about the difficulties the parties were having in negotiating the use of freight railroads' rights-of-way by Amtrak and the commuter rail agencies. These concerns were heightened after a 1988 district court decision put in doubt the enforceability of contractually negotiated indemnity provisions.³³ That decision involved a catastrophic collision in 1987 of an Amtrak train and a Conrail train in Chase, Maryland, that resulted in 16 deaths and over 350 injuries. A Conrail engineer admitted, among other things, that the Conrail crew had recently used marijuana, was speeding, and was operating a train in which an audible warning device had been intentionally disabled. The engineer pleaded guilty to manslaughter and was given the maximum penalty. The plaintiffs in many of the cases brought against Conrail and Amtrak alleged that Conrail or Amtrak, or both, had committed reckless, wanton, willful, or grossly negligent acts and asserted entitlement to compensatory as well as punitive damages. Amtrak brought an action before the trial court seeking a declaration of the rights and obligations of the parties concerning the indemnification agreement, which required that Amtrak defend and indemnify Conrail for any claims and damages arising out of the Chase accident. The trial court held that Amtrak was not required to indemnify Conrail where there were allegations and a showing of gross negligence, recklessness, willful and wanton misconduct, intentional misconduct, or conduct so serious that it warranted the imposition of punitive damages. The court found that public policy would not allow the enforcement of indemnification provisions that appear to cover such extreme misconduct, because serious and significant disincentives to railroad safety would ensue.

³²A tort is a civil (as opposed to a criminal) wrong that causes injury, other than a breach of contract, for which the victim may sue to recover damages. See, Congressional Research Service, *Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes*, February 26, 2003.

³³*National Railroad Passenger Corp. v. Consolidated Rail Corp.*, 698 F. Supp. 951 (D.D.C. 1988), *vacated on other grounds*, 892 F.2d 1066 (D.C. Cir. 1990).

We have previously concluded that the \$200 million cap on passenger claims arising from a single rail accident applies to all commuter rail operators³⁴ as well as to Amtrak, based on the plain language of the statute.³⁵ 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.”³⁶ Additionally, the act defines a claim, in part, as “a claim made against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State.”³⁷ We also concluded that the cap does not apply to third-party claims—that is, claims by parties other than passengers.³⁸ Some commuter rail agencies, however, have expressed uncertainty regarding whether the cap applies to them. In addition, some freight railroad officials have stated that although they believe the cap does apply to commuter rail agencies, they will not rely on the cap in determining the level of insurance that a commuter rail agency must carry until the cap’s applicability to commuter rail agencies has been tested in a court of law. No courts have decided whether the cap applies to commuter rail agencies.

Questions Remain Regarding Indemnification for Gross Negligence and Willful Misconduct

In addition to establishing the \$200 million cap on liability, ARAA states that “a provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.”³⁹ As we noted in our 2004 report, this language forms the statutory underpinning for the indemnification agreements that the passenger and freight railroads use to

³⁴We use the term “commuter rail operator” to be consistent with the language in ARAA. In these cases, a commuter rail operator may be a commuter rail agency, but it could also be another entity operating the commuter service on behalf of the commuter rail agency.

³⁵[GAO-04-240](#).

³⁶49 U.S.C. § 28103(a)(1).

³⁷49 U.S.C. § 28103(e)(1).

³⁸The cap 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).

³⁹49 U.S.C. § 28103(b).

allocate liability between the two parties.⁴⁰ ARAA's allocation of financial responsibility for claims was not addressed in a court of law until July 2008, when a federal court interpreted the language in the act that authorizes providers of passenger rail transportation to allocate financial responsibility for claims. The opportunity for interpretation arose when the United States Court of Appeals for the Second Circuit addressed two consolidated claims resulting from an accident involving Amtrak.⁴¹ In 2008, the Second Circuit held in the *O&G Industries v. National Railroad Passenger Corp.* opinion that 49 U.S.C. § 28103(b), the provision in ARAA that authorizes a provider of rail passenger transportation service to enter into contracts that allocate financial responsibility for claims, preempted a Connecticut statute that prohibited agreements that indemnify a party for its own negligence.⁴² The court stated, in addition, that the provision superseded the opinion concerning the 1987 Chase, Maryland, accident in which the district court found that it was a contravention of public policy to indemnify for gross negligence, recklessness, or willful misconduct. Some commuter rail agencies have questioned whether this 2008 opinion would apply to commuter rail agencies. In addition, some officials have questioned whether ARAA would preempt state sovereign immunity provisions.⁴³ However, a federal district court held in a January 2009 memorandum of decision that 49 U.S.C. § 28103(b) preempted Pennsylvania's sovereign immunity statute.⁴⁴ The 2008 federal court of appeals opinion is very recent, and it will take time to see how the opinion is interpreted and applied to indemnity provisions in agreements between commuter rail agencies and freight railroads.

⁴⁰An indemnification provision is a contractual provision under which one party agrees to protect the other party against loss or damages it may sustain in connection with the contract.

⁴¹The Second Circuit consists of all federal courts within Connecticut, New York, and Vermont.

⁴²537 F. 3d 153 (2d Cir. 2008), *petition for cert. filed* (U.S. Jan. 14, 2009) (No. 08-895).

⁴³Two Supreme Court cases reflect the U.S. Supreme Court's fairly recent shift toward protecting state sovereign immunity against federal legislation waiving a state's immunity from suit by a private party: *Seminole Tribe of Florida v. Florida*, 571 U.S. 44 (1996), which holds that Congress cannot rely on the Commerce Clause to abrogate the Eleventh Amendment immunity that states enjoy from suit by a private party in a federal court, and *Alden v. Maine*, 527 U.S. 706 (1999), which holds that Congress cannot force unconsenting states to be sued by a private party in their own state courts.

⁴⁴*Deweese v. National Railroad Passenger Corp.*, 2009 WL 222986, 2009 U.S. Dist. LEXIS 6451 (E.D. Pa. 2009) (Memorandum of Decision).

While the Court of Appeals stated in the *O&G Industries* opinion that it was the intent of Congress to permit indemnity agreements regarding any claims against Amtrak, STB, when setting the terms of agreements between Amtrak and freight railroads, has held that it is against public policy to indemnify an entity against its own gross negligence or willful misconduct.⁴⁵ For example, in a 2006 decision, STB held that an indemnity provision could not be used to indemnify a freight railroad against its own gross negligence or willful misconduct, since such an interpretation would “contravene well-established precedent that disfavors such indemnification provisions” and would be contrary to provisions in the federal government’s rail transportation policy⁴⁶ that requires STB to “promote a safe and efficient transportation system” and “operate facilities and equipment without detriment to the public health and safety.”⁴⁷ STB staff told us that they could not speak for the board, but because the *O&G Industries* opinion involved preemption of a state statute, they were not sure that the opinion would have any effect on future STB decisions.

Various Factors, Such as Financial Conditions and Federal and State Laws, Influence Negotiations of Liability and Indemnity Provisions

Commuter rail agency, Amtrak, and freight railroad officials identified several factors that influence negotiations of liability and indemnity provisions. These factors are the freight railroads’ business perspective, the financial conditions at the time of negotiations, increased awareness or concern about liability and insurance requirements, and federal and state laws. The influence of each of these factors on liability and indemnity provisions varies. For example, while state laws may be an important factor in influencing liability and indemnity provisions between a commuter rail agency and a freight railroad in one agreement, they may have little to no influence on the negotiations of liability and indemnity provisions in another agreement. Similarly, the effects of any of these factors also vary, and each of them has the potential to delay or stall negotiations. However, other factors that might be considered influential, such as commuter rail ownership of infrastructure, were generally

⁴⁵The Rail Passenger Service Act of 1970 provides that Amtrak and the freight railroads may contract for Amtrak’s use of the facilities owned by the freight railroads. If the parties cannot agree on a contract, STB may order access and prescribe the terms and conditions of the contract, including compensation.

⁴⁶49 U.S.C. § 10101(3), (8).

⁴⁷*Boston and Maine Corp. and Springfield Terminal Railway Co. v. New England Central Railroad*, STB Finance Docket No. 34612 (2006), at 1-2.

reported as having little effect on negotiations of liability and indemnity provisions.

Several Factors Influence Negotiations of Liability and Indemnity Provisions

- *Freight railroads' business perspective.* In negotiations between commuter rail agencies and freight railroads, the freight railroads' business perspective influences their starting position for negotiations of liability and indemnity provisions. Commuter rail agencies do not have statutory access to freight-owned rights-of-way. Rather, as owners of the infrastructure, freight railroads can decide whether to allow commuter rail agencies to use their rights-of-way. Officials from freight railroads told us that they are willing to share their infrastructure with commuter rail agencies when sharing makes business sense and does not impinge on their freight operations. From the freight railroads' perspective, commuter rail agencies' compensation offers for the use of freight-owned rights-of-way are often inadequate, and 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. In addition, freight service is the freight railroads' core business, and their ability to efficiently move freight through their systems must be protected. As a result, freight railroad officials said they are unwilling to assume any additional risk from allowing commuter rail agencies to use their rights-of-way.

Understandably, freight railroads want to minimize their exposure to liability from any potentially large damage awards and associated costs that may result when they allow commuter rail agencies to operate on their rights-of-way. As a result, freight railroads have adopted what is referred to as the "but for" philosophy—that is, but for the presence of the commuter rail service, the freight railroad would not be exposed to certain risks; therefore, the freight railroad should be held harmless. Freight railroad officials stated that they must take this position to protect their businesses and shareholders from potential lawsuits that could financially ruin their company.

To protect themselves from additional liability, freight railroads typically require that commuter railroads purchase liability insurance that covers both parties. Officials from several commuter rail agencies told us that they recognize and understand the freight railroads' viewpoint. Nearly half of commuter rail agency officials acknowledged insurance as a cost of doing business, and eight mentioned that they would purchase the amount that they currently carry even if the freight railroad did not require them to do so. Officials from five commuter rail agencies said they purchase more insurance than is required in their agreements because they recognize that potential claims may exceed the amounts stated in their agreements.

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- *Financial conditions at the time of negotiations.* Officials from several commuter rail agencies and freight railroads said that the financial health of the freight railroads at the time of their negotiations affected the liability and indemnity provisions. For example, officials from one commuter rail agency said they were able to secure favorable liability and indemnity provisions by providing revenue to two freight railroads that were struggling financially in the early and mid-1990s. Officials from another commuter rail agency said that the terms of their agreements that originated from freight railroad bankruptcies in 1983 are more favorable to the commuter rail agency than the agreements they have subsequently negotiated with other freight railroads. Over the last 25 years, freight rail traffic has significantly increased and the financial health of the industry has improved. As a result, hosting commuter rail service is not a significant source of revenue for freight railroads. For example, officials from one freight railroad said that revenue from commuter rail agencies does not compensate for the associated capacity loss. Furthermore, officials from another freight railroad said that no amount of revenue from commuter rail agencies could sufficiently compensate them for the risk in assuming liability for passenger claims.
 - *Increased awareness or concern about liability and insurance requirements.* Eight commuter rail agency and freight railroad officials also said that the level of awareness or concern about liability issues has grown over time. For example, one commuter rail agency official said that negotiations have become more difficult, in part, because both freight railroads and commuter rail agencies are more knowledgeable about liability issues—that is, freight railroads are now more precise in the terms they require, and commuter rail agencies are more aware of the implications of these agreements. Officials from four of the five freight railroads that host commuter rail operations said that they now would not agree to some terms that they had agreed to in the past. In some cases, these railroads are trying to renegotiate the liability and indemnity provisions in existing agreements. Freight railroads also expressed concern about changes in how courts interpret gross negligence and about the application of punitive damages. In particular, freight railroads expressed concern that what juries once viewed as normal negligence, they may now view as gross negligence; therefore, they want commuter rail agencies to indemnify them against both negligence and gross negligence. For example, one freight railroad views a new project as a “nonstarter” if the commuter rail agency refuses to indemnify the freight railroad for incidents involving gross negligence. Additionally, if a railroad is found guilty of gross negligence, a jury may award punitive damages; therefore, one freight railroad is trying to renegotiate its insurance

provisions in a 25-year-old agreement to include coverage for punitive damages.

Additionally, views on sufficient amounts of insurance have changed over time. Specifically, freight railroads are requiring more insurance coverage for new commuter rail projects than what they had required in some past agreements. For example, officials from one freight railroad said that \$100 million seemed sufficient when the railroad signed an agreement with a commuter rail agency in 1992. However, these same officials stated that they now seek much higher levels of coverage to use their rights-of-way, citing concerns about potential lawsuits and large settlements awarded by juries. Similarly, officials from other freight railroads told us that, to the extent possible, they seek between \$200 million and \$500 million in insurance when negotiating new agreements or renewing existing ones. Officials from two proposed commuter rail agencies noted that they anticipate it could be challenging and costly to obtain insurance coverage for the amount of insurance the freight railroads are requiring them to obtain. Officials from freight railroads and commuter rail agencies also questioned how claims from the recent Metrolink accident will affect the amount of insurance required and the accessibility of insurance. For example, officials from one commuter rail agency stated that the Metrolink accident and current economic conditions could cause their insurance premiums to spike, and they are, therefore, exploring options to stabilize their insurance costs.

- *Federal and state laws.* While ARAA has addressed many major liability concerns, some freight railroads and commuter rail agencies are reluctant to rely on some of its provisions. We have previously reported that all commuter rail authorities or operators, as well as Amtrak, are covered by the \$200 million cap on awards for claims by or on behalf of rail passengers resulting from an individual rail accident.⁴⁸ However, although a majority of the freight railroads and commuter rail agencies with whom we spoke told us that the liability cap applies to commuter rail agencies, a majority of freight railroads and a few commuter rail agencies expressed concern because the statute has not been tested in court. One freight railroad has addressed this concern by including a clause in its agreements that would reopen negotiations if the ARAA cap were overturned by a court or amended. Other freight railroads seek higher levels of insurance coverage to mitigate their concerns about the ARAA cap. Officials from one commuter rail agency told us that the freight railroad wants to

⁴⁸ [GAO-04-240](#).

increase the level of insurance in their existing agreement from \$250 million to \$500 million, which has been a sticking point in renegotiating the agreement. Officials from this freight railroad told us they are seeking \$500 million in insurance, in part, because the cap has not been tested in court and because the cap does not cover third-party claims. For example, as we have reported, claims from third parties affected by a hazardous material release that might occur as a result of a commuter-freight collision would not be capped at \$200 million. Officials from several freight railroads and commuter rail agencies said that the applicability of the \$200 million liability cap to commuter rail agencies will likely be tested in court as a result of the recent Metrolink accident.

Amtrak's statutory rights influence the negotiations of liability and indemnity provisions in agreements between Amtrak and freight railroads as well as between Amtrak and commuter rail agencies. For example, because Amtrak has statutory access rights to freight rail infrastructure, Amtrak and freight railroads must reach an agreement for the shared use of freight-owned infrastructure, or, in the event of an impasse, STB will resolve the outstanding issues. Although the provisions in agreements between Amtrak and freight railroads vary, freight railroad officials said that their negotiation processes were fairly standardized as a result of Amtrak's statutory access rights. In addition, Amtrak officials noted that Amtrak is prohibited from cross-subsidizing commuter rail agencies and freight railroads on the NEC for some costs.⁴⁹ According to Amtrak officials, these statutes influence their negotiations with freight railroads and commuter rail agencies, and Amtrak cannot assume any additional liability for these parties in its agreements for the shared use of infrastructure. Specifically, Amtrak officials stated that Amtrak cannot assume liability for commuter rail agencies when allowing commuter rail agencies to use Amtrak's infrastructure. As a result, Amtrak's negotiations with commuter rail agencies generally result in no-fault liability and indemnity provisions in which the commuter rail agency assumes most of the liability.

Commuter rail agency, freight railroad, and Amtrak officials also identified various types of state laws that influence negotiations of liability and indemnity provisions.⁵⁰ The following information briefly describes

⁴⁹49 U.S.C. § 24904(c)(1).

⁵⁰The state laws identified by commuter rail agency, freight railroad, and Amtrak officials do not represent the universe of state laws that could influence the negotiations of liability and indemnity provisions.

examples of the different types of state laws that can influence negotiations. See table 1 for examples of these types of laws.

- *Liability caps for railroads or transit agencies.* Some state laws limit commuter rail agencies' liability exposure for accidents.
- *Sovereign immunity laws or tort caps.* These laws limit the types of claims that may be filed against public agencies and limit the amount of liability to which a public agency can be exposed.
- *Prohibition against public indemnification of private entities.* Some state laws prohibit a public commuter rail agency from agreeing to any indemnification provisions.
- *Prohibition against indemnification for negligence or gross negligence.* Some state laws prohibit indemnification of an entity against its own negligence or gross negligence.
- *State laws addressing punitive damages.* Some state laws prohibit insuring against punitive damages. Additionally, in some states, commuter rail agencies are immune from paying punitive damages because they are public entities.

Table 1: Types and Examples of State Laws That May Affect Liability and Indemnity Negotiations

Type of state law	Example of state law in select states
Liability caps for railroads or transit agencies	<p>North Carolina set its liability cap at \$200 million to mirror the amount in ARAA; however, the North Carolina statute caps all liability, including third-party claims, in a commuter rail incident.</p> <p>A Massachusetts statute limits claims to the amount of insurance, which is \$75 million, and applies to the commuter rail agency, its contract operator, and other entities that provide commuter rail services.</p>
Sovereign immunity laws or tort caps	<p>Pennsylvania law caps most claims filed against the Southeastern Pennsylvania Transportation Authority at \$250,000 per person and \$1 million per incident.</p> <p>Florida law caps payments for tort claims against the state and its agents at \$100,000 per person or \$200,000 per incident. Although the sovereign immunity provisions have been extended to commuter rail contractors for the Tri-Rail service in Southern Florida, the Florida legislature was unable to pass legislation during the 2008 legislative session extending sovereign immunity to contractors for the proposed SunRail service in Central Florida.^a</p>

Type of state law	Example of state law in select states
Prohibition against public indemnification of private entities	<p>The New Mexico constitution prohibits the state government from subsidizing a private entity and, as a result, prohibits indemnification of a private entity. State laws were changed to allow the state to purchase insurance covering BNSF Railway's (BNSF) liability associated with New Mexico Rail Runner Express's service by listing them as a named-insured. However, some concerns exist that this statute could still be invalidated by the state constitution. Sovereign immunity laws in New Mexico have also resulted in Amtrak's assumption of more liability than it assumes under some agreements with other commuter rail agencies.</p> <p>In Minnesota, state law prohibited a public agency from indemnifying a private company for exposure that the private company could face in the event of a catastrophic loss. To facilitate the negotiations between Northstar and BNSF, the state passed legislation that treats the planning, operation, and maintenance of commuter rail facilities and services as governmental functions serving a public purpose. The statute allows Northstar to provide indemnification and to procure insurance that would protect both itself and BNSF. The statute authorizes indemnification for all types of claims or damages.</p>
Prohibition against indemnification for negligence or gross negligence	<p>Massachusetts case law prohibits indemnification against gross negligence; however, there are no statutes codifying this prohibition.^b Negotiations between the Massachusetts Bay Transportation Authority (MBTA) and CSX Transportation (CSX) have stalled over the general issue of how to allocate risk. The public side (MBTA) has stated that it cannot indemnify the private side (CSX) for its gross negligence or intentional acts, and CSX officials say they do not anticipate changing their position on indemnification provisions for willful misconduct and gross negligence.^c</p>
State laws addressing punitive damages	<p>Although the Illinois Tort Immunity Act does not give the Northeast Illinois Regional Commuter Railroad Corporation (Metra) sovereign immunity protections, the act protects Metra from punitive damages. According to Metra officials, local government entities cannot indemnify for punitive damages because such indemnification is considered against public policy.</p> <p>In California, punitive damages are not allowed in lawsuits against government entities, such as the Joint Powers Board that operates the Caltrain commuter rail service. The board does not indemnify the Union Pacific Railroad Company for any punitive damages. Furthermore, in California, punitive damages are not insurable.</p>

Source: GAO analysis of state laws.

^aThe proposed SunRail commuter service was known as Central Florida Commuter Rail until December 2008.

^bSee *Massachusetts Bay Transportation Authority and Massachusetts Bay Railroad Co. v. CSX Transportation Inc. and Cohenno Inc.* (Super. Ct. Civ. Action 2008-1762-BLS1) (Memorandum and Order on Defendant CSX Transportation, Inc.'s Motions to Dismiss).

^cCSX believes that the preemptive nature of ARAA negates any state prohibition of MBTA indemnifying for gross negligence. MBTA officials stated that they believe ARAA does not preempt Massachusetts state case law, but even if the act is preemptive, the authority is only permissive (i.e., the act would allow a party to contractually indemnify for gross negligence, but would not require it to do so).

Other Factors Generally Have Little Effect on Negotiations of Liability and Indemnity Provisions

Several factors that might be considered influential, such as commuter rail ownership of shared-use infrastructure, were generally reported as having little effect on liability and indemnity negotiations.

- *Commuter rail agencies' ownership of infrastructure.* Commuter rail agencies that own their infrastructure are not necessarily able to set the terms of their agreements with freight railroads. A majority of commuter rail agencies that own their infrastructure purchased it from freight railroads. In general, as a condition of the sale of infrastructure, freight railroads maintain rights for continued freight use and require specific liability and indemnity provisions. For example, a commuter rail agency is currently seeking to purchase a segment of freight track to expand its service, but negotiations have stalled because the commuter rail agency does not want to agree to certain liability and indemnity provisions. Officials from one freight railroad said that in negotiations for the purchase of rail lines, the liability terms are a trade-off for a lower cost for the infrastructure. For example, in this freight railroad's negotiations with one commuter rail agency, the price for purchasing the right-of-way without attached liability and indemnity provisions would have been \$1.3 billion; rather, the parties settled on a price of \$150 million, with an agreement for continued freight operations that included the freight railroad's required liability and indemnity provisions.
- *Extent of use.* The extent of a tenant commuter rail agency's use of the host freight railroad's infrastructure, which can be measured by such metrics as the number of trains or ridership, does not generally influence the liability and indemnity provisions. For example, one freight railroad official said that the number of planned commuter trains is not specifically relied upon in determining the amount of insurance required in the agreement. However, two of the insurance brokers with whom we spoke said that such metrics may be used to help calculate insurance premiums. According to one broker, however, a change in one of these metrics may not affect the insurance premium unless the change is significant—for example, an increase from 100,000 to 200,000 daily passengers.
- *Funding of improvements on freight-owned infrastructure.* Commuter rail agencies' funding of infrastructure improvements, such as track upgrades, on freight infrastructure does not generally affect liability and indemnity provisions. Officials from one freight railroad said that such improvements do not compensate for the liability risks associated with allowing passenger railroads to use freight infrastructure. However, funding for infrastructure improvements may have other effects, such as influencing freight railroads' initial willingness to enter into overall

negotiations for shared use or securing priority dispatching for commuter trains.

- *Advanced safety technologies.* Employing advanced safety technologies does not necessarily affect negotiations over liability and indemnity provisions. Although improved safety may not influence the liability and indemnity provisions, officials from three freight railroads or commuter rail agencies mentioned that improved safety could reduce insurance premiums. Similarly, two of the insurance brokers with whom we spoke said that a railroad's safety program can influence the calculation of insurance premiums because improved safety reduces the likelihood of accidents and, therefore, decreases the likelihood that the insurance company will suffer a loss. However, according to Amtrak officials, although such technologies may reduce the incidents of smaller claims that fall within the self-insured retention, they may not reduce premiums for liability insurance until the long-term loss history for the rail agency improves.

Commuter Rail Agency, Amtrak, and Freight Railroad Officials Identified Several Options for Facilitating Negotiations

Commuter rail agency, Amtrak, and freight railroad officials identified several options for facilitating negotiations of liability and indemnity provisions, including amending ARAA, establishing alternatives to commercial insurance, increasing commuter rail agencies' leverage in negotiations with freight railroads, and separating passenger and freight rail infrastructure.⁵¹ While each of the options could facilitate negotiations on liability and indemnity provisions, each option has advantages and disadvantages to consider. The discussion that follows is not intended to endorse any potential option, but instead to describe some potential ways to facilitate negotiations.

⁵¹The options that we identify in this section of the report are based on information we obtained from our interviews with commuter rail agency, Amtrak, and freight railroad officials. Not all of these officials identified each of these as options for facilitating negotiations of liability and indemnity provisions. Therefore, our intent is not to focus on the frequency with which the officials identified each option, but to inform the reader about the various options that could facilitate negotiations of liability and indemnity provisions in the future.

**Commuter Rail Agency,
Amtrak, and Freight
Railroad Officials
Suggested Amending
ARAA to Address
Concerns**

Officials from commuter rail agencies, Amtrak, and freight railroads cited amending ARAA as an option for facilitating negotiations on liability and indemnity provisions. In particular, officials from commuter rail agencies and freight railroads stated that the statute should be amended to make it clear that the liability cap applies to commuter rail agencies, and officials from commuter rail agencies, freight railroads, as well as Amtrak, stated that the statute should be amended to include nonpassenger claims.

Officials from commuter rail agencies, Amtrak, and freight railroads cited several advantages to amending ARAA. First, clarifying that the statute applies to commuter rail agencies would eliminate the uncertainty about its applicability in the absence of a court decision. In addition, such a clarification, along with the inclusion of nonpassenger claims in the liability cap, could lower costs for commuter rail agencies by limiting the amount of insurance that freight railroads require commuter rail agencies to carry. For example, officials from one commuter rail agency stated that if ARAA were amended to make it clear that it applied to commuter rail agencies and covered nonpassenger claims, freight railroads would be less likely to seek insurance beyond the \$200 million liability cap to cover claims to which the cap does not apply. Similarly, Amtrak officials stated that including nonpassenger claims under the liability cap could reduce Amtrak's need for excess liability insurance. Officials from several freight railroads also noted that such changes could facilitate future negotiations with commuter rail agencies. Officials from freight railroads also stated that a clear federal cap on liability for commuter rail agencies could eliminate the need to adapt to various state laws that can affect liability and indemnity negotiations. For example, according to officials from two freight railroads, a uniform, standardized cap that applies to all commuter rail agencies would preempt some state laws, such as those that cap damages for commuter rail claims at an amount lower than \$200 million.

Commuter rail agency and freight railroad officials also cited several disadvantages to amending ARAA. Officials from one freight railroad stated that ARAA already applies to commuter rail agencies and limits the amount of liability insurance commuter rail agencies are required to obtain to \$200 million. According to these officials, although there is some lack of clarity about the statute's applicability to commuter rail agencies and the statute does not cover all types of claims, these issues can be addressed by requiring the commuter rail agency to obtain comprehensive insurance coverage or through other provisions in the agreements. For example, adequate insurance coverage can mitigate the issues that may arise from various and conflicting state laws by providing protection for various kinds of liabilities. Similarly, although ARAA does not cover

liability claims resulting from a hazardous materials spill, an agreement can be structured in such a way that these claims are covered. According to these freight railroad officials, the provisions in ARAA provide adequate protections for negotiating railroad liability and indemnity provisions. Furthermore, these officials told us it may be difficult to make some changes to the statute without opening up its entire liability section to reexamination. Finally, some commuter rail agency officials stated that amending ARAA could cause them to have less favorable liability provisions than they currently enjoy. For example, officials from several commuter rail agencies told us that they carry less insurance than the \$200 million cap. According to officials from one commuter rail agency, amending ARAA to clarify that the \$200 million liability cap applies to all commuter rail agencies could result in higher levels of insurance and increased costs for this commuter rail agency.

Commuter Rail Agency,
Amtrak, and Freight
Railroad Officials
Identified Alternatives to
Traditional Commercial
Insurance

Commuter rail agency, Amtrak, and freight railroad officials and representatives from the insurance industry identified the following three alternatives to traditional commercial insurance options that could increase the availability and affordability of liability insurance coverage:

- *Insurance pool.* A group of organizations with similar characteristics, such as a group of commuter rail agencies, pool their assets to obtain a single commercial insurance policy, rather than obtaining individual commercial insurance policies.
- *Captive insurance.* A privately held insurance company that issues policies, collects premiums, and pays claims for its owners, but does not offer insurance to the public. This company may be either a single-parent captive, which is owned by a single entity that insures the risks of its parent company, or a group captive, which is owned by multiple entities and the owners are also the policyholders. Usually, the owners of a group captive are fairly homogenous and have similar risks, such as a group of commuter rail agencies, although this is not a requirement of a captive. A captive would allow a commuter rail agency or a group of commuter rail agencies to self-insure for liability or provide liability insurance for its members outside of the traditional commercial insurance market.
- *Risk retention group.* Similar businesses with similar risk exposures create their own liability insurance company to self-insure their risks as a group. Risk retention groups were established through the Product Liability Risk Retention Act of 1981, as amended by the Liability Risk Retention Act of 1986, which partially preempts state insurance laws by allowing risk retention groups to operate in states in which they are not

domiciled.⁵² Commuter rail agencies, therefore, could form a risk retention group without having to consider the various state laws that could affect their liability negotiations with freight railroads.

Commuter rail agency, Amtrak, and freight railroad officials identified several advantages to pooling insurance as a way to facilitate negotiations on liability. First, all of the industry insurance options identified would allow members to pool their assets, which could allow them to obtain more or cheaper insurance coverage than they could obtain independently. For example, a group of commuter rail agencies could form a captive to obtain coverage for their primary layers of insurance, which are the most expensive, given that most claims beyond the self-insured retention would be expected to fall within these layers.⁵³ Second, pooled insurance coverage would spread out liability across a wider base of commuter rail agencies, with varying risk levels, which also would allow participants to obtain greater and more affordable coverage than some individual commuter rail agencies could obtain independently in the commercial insurance market. For example, officials from one commuter rail agency stated that forming a group captive with other commuter rail agencies could level out the insurance premiums paid by each commuter rail agency participating in the captive, and that the agency plans to reach out to other commuter rail agencies to further explore this option. Third, pooled insurance options could make it easier for new or smaller commuter rail agencies with limited or no risk history to obtain affordable insurance coverage. Similarly, according to a captive insurance broker, by combining the loss histories of newer commuter rail agencies with those of other commuter rail agencies, a group captive could better predict potential claims than an individual insurance company could predict for a commuter rail agency with no risk history. Finally, forming a risk retention group could eliminate the challenges associated with various state laws that limit the types of indemnification and insurance options available to commuter rail agencies. Risk retention groups are required only to register with the regulator of the state in which they intend to sell insurance, whereas traditional captives are subject to the licensing requirements and

⁵² 15 U.S.C. §§ 3901-3906.

⁵³ Commuter rail agencies' insurance coverage is usually structured in layers of \$25 million beyond the self-insured retention, up to the total amount of insurance coverage (e.g., \$200 million). The lower layers are typically more expensive because claims are likely to fall in these layers, rather than the layers covering the upper limits of the insurance coverage.

oversight of each state outside of their state of domicile.⁵⁴ Although no commuter rail agency or freight railroad currently participates in an insurance pool with other commuter rail agencies or freight railroads,⁵⁵ some commuter rail agency officials told us they are interested in exploring this option for facilitating negotiations. In addition, officials from two freight railroads said they would consider joining an insurance pool as a way to pool their risk with other railroads, and several freight railroad officials also stated they would accept pooled insurance from commuter rail agencies as a valid option for providing liability coverage.

Commuter rail agency, Amtrak, and freight railroad officials also identified several disadvantages to the various alternatives to traditional commercial insurance options identified. First, some commuter rail agency officials stated that their commuter operations were already very safe; therefore, they would not benefit from an insurance pool with other commuter rail agencies. Similarly, according to an insurance broker, larger commuter rail agencies, or those with a better risk profile, may not join a pool or might leave the pool if they could obtain cheaper insurance coverage on the commercial insurance market. Their decision not to participate in the pool would lead to adverse selection, with only smaller or riskier commuter rail agencies remaining in the pool, which could reduce some of the advantages that a pool would provide. Second, some commuter rail agency officials stated that they have not had problems obtaining insurance because of the soft, or competitive, insurance market. According to an insurance broker, pooling insurance during a soft market is likely more expensive than obtaining individual commercial insurance policies because of the administrative and capital costs of maintaining an insurance captive or risk retention group. In addition, some commuter rail agency officials stated that insurance pools can be difficult to administer and require decisions about who will participate, whether participation will be voluntary or mandatory, and what should be done if claims exceed

⁵⁴We previously have reported that traditional insurers, as well as nonrisk retention group captive insurers, are subject to the licensing requirements and oversight of each nondomiciliary state in which they operate, whereas risk retention groups are required to register only with the regulator of the state in which they intend to sell insurance and to provide copies of certain documents originally provided to domiciliary regulators. See, GAO, *Risk Retention Groups: Common Regulatory Standards and Greater Member Protections Are Needed*, GAO-05-536 (Washington, D.C.: Aug. 15, 2005).

⁵⁵Two commuter rail agencies told us that they have single-parent captives that provide coverage for some of their other transit programs or part of their commuter rail operation. In addition, some freight railroad officials stated that they have single-parent captives.

the pool's reserves. However, if the insurance market became less competitive, pooling might provide a more affordable option, particularly for new or smaller commuter rail agencies that could have difficulty obtaining coverage.⁵⁶ For example, Florida set up an insurance pool because of a severe shortage of catastrophe property reinsurance capacity, stricter policy terms and conditions, and sharp increases in property catastrophe cover rates following Hurricane Andrew. Finally, one commuter rail agency official stated that it could be difficult for participating agencies to reenter the commercial insurance market if, for example, an insurance pool falls apart because it is undercapitalized—that is, there is a risk for commuter rail agencies in ending their current insurance policies to join a pool. Amtrak officials also stated that these pooled insurance options are unlikely to be viable without federal financial backing or verifiable commercial reinsurance. Furthermore, officials from two freight railroads noted they would not likely join an insurance pool with commuter rail agencies because it is not in their business interests to help pay for claims involving passenger rail.

Commuter rail agency, Amtrak, and freight railroad officials also identified several federal insurance options that could facilitate negotiations of liability and indemnity provisions. Specifically, several commuter and freight railroad officials identified catastrophic incident insurance programs as potential models for providing railroad liability insurance. These insurance programs exist to cover risks that the private sector has been unable or unwilling to provide by itself. Commuter rail agency and freight railroad officials most frequently identified the Price-Anderson Act as a model for providing railroad liability insurance.⁵⁷ Under this model, commuter rail agencies would obtain primary insurance up to a certain amount and could pool their assets to obtain secondary insurance coverage for incidents with claims that exceed the primary insurance amount. The federal government could also be called upon to provide additional funding if an incident's claims exceeded both the primary and secondary insurance coverage. Officials from one freight railroad stated that a Price-Anderson type of insurance program could address current

⁵⁶During a hard market, insurance prices rise and insurers tend to narrow their coverage, tighten their underwriting standards, and withdraw from certain markets.

⁵⁷Under the Price-Anderson Act, licensees of nuclear power plants are required to purchase primary and secondary insurance, up to a cap. The act also provides a process by which the Nuclear Regulatory Commission can ask Congress for additional funds if claims for damages from a nuclear incident exceed the pooled primary and secondary insurance coverage. 42 U.S.C. § 2210.

limitations in the railroad insurance market because the act contemplates appropriations if additional funding is needed, among other benefits. Similarly, insurance coverage provided under other federal government programs, such as terrorism insurance, also was cited as a potential model for providing railroad liability insurance coverage. For example, officials from one freight railroad stated that the fund established to compensate victims from the September 11, 2001, terrorism attacks could be useful for considering how to compensate victims of a catastrophic railroad incident.

Commuter rail agency and freight railroad officials identified several advantages of a federally backed insurance program for railroads. For example, some of these officials stated that such programs could reduce insurance premiums, could spread out risk among participating railroads, and would ensure that claims could be paid to those affected by a high-cost, or catastrophic, incident. However, as we have previously reported, such programs also could crowd out private insurers and reduce the private market's ability and willingness to provide coverage.⁵⁸ In addition, a federal insurance program would expose the federal government to potentially significant claims on future resources, which could ultimately result in costs to taxpayers.

Commuter Rail Agencies Identified Options That Would Increase Their Leverage in Negotiating Liability and Indemnity Provisions

Some commuter rail agencies identified options that would give them additional leverage in liability and indemnity negotiations with freight railroads. In particular, a few commuter rail agencies stated that statutory access rights to freight-owned infrastructure, similar to Amtrak's statutory access rights, could facilitate negotiations by forcing freight railroads to the negotiating table. However, although freight railroads might be required to enter into negotiations, they would not necessarily change their positions on the levels of liability and indemnification they would require. In addition, providing statutory access to commuter rail agencies could interfere with the freight railroads' ability to make business decisions about their operations, particularly if the commuter rail operations would restrict the capacity of a major freight route that otherwise would not have commuter rail service. Officials from one commuter rail agency also stated that requiring freight railroads to allow commuter rail agencies to operate on their infrastructure could make relationships with the freight railroads more acrimonious. Instead,

⁵⁸GAO, *Natural Disasters: Public Policy Options for Changing the Federal Role in Natural Catastrophe Insurance*, [GAO-08-7](#) (Washington, D.C.: Nov. 26, 2007).

incentives that encourage freight railroads to cooperate with commuter rail agencies, such as tax incentives or service expansions in other areas, could do more to facilitate negotiations, according to these officials.

Officials from a few commuter rail agencies also stated that having an independent entity mediate liability and indemnity negotiations between commuter rail agencies and freight railroads could be helpful if the parties reached an impasse. For example, officials from one commuter rail agency stated that a mediating body could facilitate negotiations by requiring the freight railroad to consider the commuter rail agency's position. A provision in the Passenger Rail Investment and Improvement Act of 2008 recently extended STB's role to mediate disputes between public authorities, including commuter rail agencies and host carriers.⁵⁹ However, the mediation is nonbinding—that is, if the dispute cannot be resolved, there are no additional mechanisms in place to compel a resolution.

Commuter Rail Agency and Freight Railroad Officials Suggested Separating Passenger and Freight Traffic as an Ideal, but Costly, Option

A few commuter rail agency and freight railroad officials identified separating passenger and freight traffic as an ideal, but cost-prohibitive, option for facilitating negotiations on liability and indemnity provisions. Commuter and freight traffic could be separated temporally, with commuter rail agencies and freight railroads operating at different times of the day, or physically, with commuter rail agencies and freight railroads operating on separate tracks either in the same corridor or in separate corridors. For example, the Utah Transit Authority purchased rights-of-way from Union Pacific and built new tracks in a parallel alignment with Union Pacific tracks. As a result, the commuter and freight operations do not share the same track, with a small exception, limiting the potential for a collision. Similarly, officials from one freight railroad stated that in negotiations with an existing and new commuter rail agency, they are working to shift some of the freight operations onto different routes to minimize the interaction between commuter and freight trains. Separating passenger and freight infrastructure also could lower insurance costs for commuter rail agencies because the potential for a catastrophic incident would be significantly reduced. According to officials from a few freight railroads, the potential for a catastrophic incident, although small, drives the indemnification provisions and insurance requirements of passenger and freight rail agreements. Although the Utah Transit Authority was able to purchase rights-of-way from Union Pacific, in most cases, purchasing

⁵⁹ 49 U.S.C. § 28502.

rights-of-way or constructing new tracks is cost-prohibitive and time-consuming for commuter rail agencies. For example, officials from one commuter rail agency examined whether to build new tracks for initiating its service, but the costs were much higher than the costs of buying the tracks and sharing them with the freight railroad and paying the associated insurance costs. In addition, capacity constraints, whether they are based on future growth projections or geographic limitations, make it difficult to separate passenger and freight traffic—through either temporal or physical separation. For example, officials from one commuter rail agency stated that the geography surrounding their commuter service makes capacity expansions very difficult and costly.

Concluding Observations

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 as companies and communities look for ways to avoid highway congestion. An attractive feature of both commuter rail and intercity passenger rail is that they can operate on the same infrastructure as freight railroads. However, mixing passenger and freight traffic entails a certain level of risk. Fortunately, accidents are rare, undoubtedly due in part to the safety focus of passenger and freight rail operators, but they can be deadly, as evidenced by the September 2008 Metrolink accident.

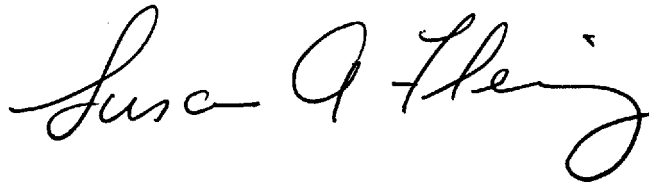
As owners of most of the rail infrastructure in the United States, freight railroads determine whether to allow commuter rail operations on their infrastructure and set the terms and conditions, including the liability and indemnity provisions, of this access. To protect their business and shareholders, freight railroads understandably seek to shift the risks associated with allowing passenger traffic on freight-owned infrastructure to the commuter rail agencies. By accepting some of the liability and indemnity provisions demanded by freight railroads, commuter rail agencies expose themselves, and ultimately taxpayers, to significant costs. Rejecting the liability and indemnity provisions sought by freight railroads, however, can cause negotiations to stall or fail, meaning that new commuter rail systems or expansions may not be realized. Different options exist to help facilitate negotiations over liability and indemnity. All of these options have advantages and disadvantages that must be carefully considered so that one form of rail does not succeed at the expense of the other.

Agency Comments

We provided a draft of this report to DOT, STB, and Amtrak for their review and comment prior to finalizing the report. Amtrak provided technical comments, which we incorporated where appropriate. DOT and STB had no comments on the draft report.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to other interested congressional committees; the Secretary of the Department of Transportation; the President and CEO of Amtrak; the Chief of Staff of the Surface Transportation Board; and other parties. The report is also available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staffs have any questions about this report, please contact me at (202) 512-4431 or flemings@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix V.



Susan A. Fleming
Director, Physical Infrastructure Issues

Appendix I: Scope and Methodology

To address our objectives, we obtained information from all existing and proposed commuter rail agencies, Class I freight railroads, and the National Railroad Passenger Corporation (Amtrak). To identify the universe of existing and proposed commuter rail agencies, we obtained a list of such rail agencies from the American Public Transportation Association (APTA). Using publicly available information, we narrowed the list of proposed commuter rail agencies to those that plan to initiate service within the next 5 years because these commuter rail agencies were more likely to have entered into negotiations with another railroad regarding liability. We then refined our list of existing and proposed commuter rail agencies to 21 existing commuter rail agencies and 5 proposed commuter rail agencies.¹ We also obtained a list of Class I freight railroads from the Association of American Railroads (AAR). We limited our scope to Class I freight railroads because they own the majority of all rail lines in the United States and, therefore, are likely to have more interaction with commuter rail agencies than short-line or regional railroads. We subsequently interviewed officials at four state departments of transportation that commuter rail agency officials identified as integral to commuter rail operations or initial start-up work. (Table 2 lists the names and locations of the railroads and the state departments of transportation we contacted as part of our review.) We also obtained information through interviews with officials from Amtrak, the Federal Railroad Administration (FRA), and the Federal Transit Administration (FTA); Surface Transportation Board (STB) staff; and representatives from industry associations, including AAR and APTA. We also interviewed a representative from the law office of K&L Gates, who has served as a consultant to commuter rail agencies.

To gather information pertaining to our objectives, we conducted semistructured interviews with officials from all identified existing commuter rail agencies, proposed commuter rail agencies, Class I freight railroads, Amtrak, and state departments of transportation. We asked about the liability and indemnity provisions between railroads, the

¹APTA's list identified 22 existing commuter rail operators. We excluded 1 commuter agency from our universe, the Alaska Railroad Corporation, because it is mostly a tourism operation. In addition to those proposed commuter rail agencies that we eliminated from our scope on the basis of publicly available information, we eliminated 2 proposed agencies when we contacted them and learned they either did not plan to initiate service within the next 5 years or did not consider themselves a commuter rail agency. For purposes of the laws that FRA and FTA administer or enforce, this list of existing and proposed commuter rail agencies is not necessarily reflective of what each agency would identify as commuter rail agencies.

financial impact of these provisions, how the courts had interpreted these provisions, the factors that had influenced negotiations, and ways to facilitate negotiations.

Table 2: Names and Locations of Existing Commuter Rail Agencies, Proposed Commuter Rail Agencies, Intercity Passenger Railroads, Class I Freight Railroads, and State Departments of Transportation That We Interviewed

Name	Location
Existing commuter rail agency	
Altamont Commuter Express	Stockton, CA
Connecticut Department of Transportation Shore Line East	New Haven, CT
Maryland Transit Administration (MARC)	Baltimore, MD
<i>Massachusetts Bay Transportation Authority (MBTA)</i>	Boston, MA
MTA Long Island Rail Road	New York, NY
MTA Metro-North Railroad	New York, NY
New Jersey Transit Corporation	Newark, NJ
New Mexico Rail Runner Express	Albuquerque, NM
North County Transit District (Coaster)	Oceanside, CA
<i>Northeast Illinois Regional Commuter Railroad Corporation (Metra)</i>	Chicago, IL
Northern Indiana Commuter Transportation District	Chesterton, IN
Peninsula Corridor Joint Powers Board (Caltrain)	San Carlos, CA
Pennsylvania Department of Transportation (PennDOT) ^a	Harrisburg, PA
Regional Transportation Authority Music City Star	Nashville, TN
<i>Sound Transit, Central Puget Sound Regional Transportation Authority</i>	Seattle, WA
South Florida Regional Transportation Authority (Tri-Rail)	Pompano Beach, FL
Southeastern Pennsylvania Transportation Authority (SEPTA) ^b	Philadelphia, PA
Southern California Regional Rail Authority (Metrolink)	Los Angeles, CA
Trinity Railway Express	Irving, TX
Utah Transit Authority (FrontRunner)	Salt Lake City, UT
Virginia Railway Express	Alexandria, VA
Proposed commuter rail agencies	
Charlotte Area Transit System	Charlotte, NC
Georgia Rail Passenger Program	Atlanta, GA
<i>Northstar</i>	Minneapolis, MN
<i>SunRail</i> ^c	Orlando, FL
TriMet Westside Express Service	Portland, OR
Intercity passenger railroad	
National Railroad Passenger Corporation (Amtrak)	Washington, D.C.

Appendix I: Scope and Methodology

Name	Location
Class I freight railroad	
<i>BNSF Railway</i>	Fort Worth, TX
Canadian National Railway Company (Grand Trunk Corporation) ^d	Montreal, Canada
Canadian Pacific Railway (Soo Line Railroad Company) ^d	Calgary, Canada
CSX Transportation	Jacksonville, FL
Kansas City Southern Railway Company ^e	Kansas City, MO
Norfolk Southern	Norfolk, VA
<i>Union Pacific Railroad Company</i>	Omaha, NE
State departments of transportation	
Delaware Department of Transportation (DELDOT) ^b	Wilmington, DE
Florida Department of Transportation (FDOT)	Tallahassee, FL
New Mexico Department of Transportation (NMDOT)	Santa Fe, NM
North Carolina Department of Transportation (NCDOT)	Raleigh, NC

Source: GAO.

Note: The entity names in italics indicate the sites that we visited during our review.

^aAmtrak runs additional trains for commuters, which PennDOT subsidizes.

^bIn addition to its regular commuter rail service, SEPTA provides “turnkey,” or contracted commuter rail service, for the Delaware Department of Transportation (DELDOT) between Newark/Wilmington, DE, and Philadelphia, PA. Information on SEPTA’s use of Amtrak services and infrastructure for the Delaware service are included in Amtrak and SEPTA data; therefore, we did not consider DELDOT as a separate commuter rail agency.

^cThe proposed SunRail commuter service was known as the Central Florida Commuter Rail until December 2008.

^dThe entire Canadian National Railway Company 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.

^eThe Kansas City Southern Railway Company does not have any agreements with passenger rail operators.

We conducted site visits to three existing commuter rail agencies, two proposed commuter rail agencies, and two Class I freight railroads. We selected existing commuter rail agencies that had agreements for access to rights-of-way, maintenance-of-way, and maintenance-of-equipment or operations with a Class I freight railroad and also had contracts with Amtrak. We also selected existing commuter rail agencies that had agreements with different freight railroads to determine if agreements varied across Class I freight railroads. (Because Class I freight railroads generally own infrastructure in particular regions of the country, we also found that this criterion gave us geographic diversity for our site visits.) In

addition, we selected existing commuter rail agencies on the basis of their ridership levels to ensure that we visited at least one commuter rail agency in the top third of ridership, middle third of ridership, and bottom third of ridership.² We selected proposed commuter rail agencies to visit that are planning to enter into contracts with different Class I freight railroads in the next 5 years. In addition, we selected sites to ensure that we would visit at least one commuter rail agency that proposes to purchase Class I freight tracks and at least one commuter rail agency that proposes to lease freight tracks. Finally, we chose to visit Class I freight railroads with the highest number of contracts with commuter rail agencies.

To identify liability and indemnity provisions in agreements among commuter rail agencies, freight railroads, and Amtrak and the resulting implications of those provisions, we requested and analyzed the liability and indemnity sections of agreements between commuter rail agencies and Class I freight railroads, commuter rail agencies and Amtrak, and Amtrak and freight railroads. We analyzed and organized the provisions in these contracts and excluded commuter rail agencies that did not have agreements with either a Class I freight railroad or Amtrak.³ In addition, we included agreements from two proposed commuter rail agencies in our analysis because their agreements with freight railroads were final.⁴ However, we did not include information from the other proposed commuter rail agencies because they either did not have an agreement with a Class I freight railroad or Amtrak or because the agreements were still preliminary and subject to change. To ensure the reliability of the information we obtained, we corroborated information provided by commuter rail agencies, Amtrak, and Class I freight railroads. For example, we compared agreements received from a commuter rail agency with agreements received from the freight railroad to ensure that the agreements were consistent.

We conducted legislative research to identify federal statutes, federal and state court cases, and STB decisions that related to contractual liability and indemnity provisions of passenger and freight railroad agreements.

²We used APTA data on ridership for 2007 to determine the ridership levels of commuter rail agencies.

³Commuter rail agencies that did not have liability agreements with Amtrak or a Class I freight railroad were the Regional Transportation Authority Music City Star and the Northern Indiana Commuter Transportation District.

⁴The SunRail agreement was contingent on legislative approval.

We also asked Amtrak, STB, the commuter rail agencies, and the freight railroads for assistance in identifying these types of cases. In addition, we asked commuter rail agencies and state departments of transportation for state statutes that had an impact on the negotiation of contractual liability and indemnity provisions. We then synthesized and summarized the information that we obtained.

To identify factors that affect negotiations of liability and indemnity provisions among passenger and freight railroads, we conducted a content analysis of the information we collected from our semistructured interviews and site visits. This content analysis captured the extent to which representatives from existing and proposed commuter rail agencies, freight railroads, and Amtrak identified particular factors that affected their negotiations and the associated effects. In addition to determining the factors that were most commonly cited, this analysis enabled us to determine whether certain factors reportedly had little effect on the negotiations. We also interviewed four state departments of transportation, referred to us by commuter rail agencies, about state laws that apply to liability and indemnity provisions and the effects of such laws on liability and indemnity provisions.

To identify potential options for facilitating negotiations of liability and indemnity provisions among passenger and freight railroads, we conducted a content analysis of the information we collected from our semistructured interviews and site visits. This content analysis captured potential options mentioned by the entities we interviewed, the associated advantages and disadvantages from the perspectives of the entities interviewed, and the change in the federal role needed to execute the options. We also asked FRA and FTA officials and STB staff about the federal role in railroad negotiations and the potential impact of some of the options identified on the federal role. Furthermore, we interviewed three insurance brokers who represented commuter rail agencies in obtaining liability insurance to provide context for the process of securing insurance, the process of calculating premium costs, and alternative insurance mechanisms that could be applied to the railroad industry. We

also reviewed prior GAO reports on insurance markets for catastrophic incidents to identify comparable models for railroad liability insurance.⁵

We did not examine the liability and indemnity provisions in agreements between commuter rail agencies and non-Class I freight railroads, nor did we look at agreements among commuter rail agencies. However, we did analyze information provided about the factors affecting negotiations between commuter rail agencies and non-Class I freight railroads; we also analyzed information from commuter rail agencies in these relationships about options for facilitating negotiations. We also did not examine 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 because this was beyond the scope of our review. Finally, we relied primarily on testimonial evidence to identify state laws and court decisions related to railroad liability and indemnity provisions and, therefore, did not analyze the universe of state laws and court decisions related to liability and indemnity provisions.

⁵GAO, *Terrorism Insurance: Status of Efforts by Policyholders to Obtain Coverage*, [GAO-08-1057](#) (Washington, D.C.: Sept. 15, 2008); *Risk Retention Groups: Common Regulatory Standards and Greater Member Protections Are Needed*, [GAO-05-536](#) (Washington, D.C.: Aug. 15, 2005); and *Nuclear Regulation: NRC's Liability Insurance Requirements for Nuclear Power Plants Owned by Limited Liability Companies*, [GAO-04-654](#) (Washington, D.C.: May 28, 2004).

Appendix II: Summary of Liability and Indemnity Provisions in Commuter Rail Agency and Freight Railroad Agreements

Dollars in millions

Commuter rail agency	Class I railroad	Ownership ^a	Is contract fault-based or no-fault?	What are provisions for freight-commuter collision? ^b	Are specific types of conduct excluded or explicitly included?	What is the level of insurance that is required ^c
Altamont Commuter Express (ACE)	Union Pacific Railroad Company (UP)	Freight ^d	No fault	No fault: each covers own (third parties shared)	Excluded	\$100
Peninsula Corridor Joint Powers Board (Caltrain)	UP	Shared	Combination ^e	No fault: each covers own (third parties fault-based)	Excluded	100
North County Transit District (Coaster)	BNSF Railway	Commuter	Fault-based ^f	Fault-based	N/A	75
Utah Transit Authority (FrontRunner)	UP	Shared corridor ^g	No fault	Silent	Excluded	100
Maryland Transit Administration (MARC)	CSX Transportation	Freight	No fault	No fault: commuter covers all liability	Both ^h	500
Massachusetts Bay Transportation Authority (MBTA)	CSX (Boston to Framingham)	Commuter	Combination ⁱ	No fault: each covers own (third parties and passengers are fault-based)	Silent	Unspecified
MBTA	CSX (Worcester to Framingham)	Freight	No fault	No fault: commuter covers all liability	Included ^j	75
Northeast Illinois Regional Commuter Railroad Corporation (Metra)	BNSF	Freight	Combination ^k	Fault-based	Silent	200
Metra	Canadian National Railway Company (CN) (Illinois Central Line)	Freight	No fault	No fault: each covers own (third parties shared)	Silent	Unspecified
Metra	CN (Wisconsin Central Line)	Commuter	No fault	No fault: freight covers all liability	Excluded	Unspecified
Metra	CN (Wisconsin Central Line)	Freight	No fault	No fault: commuter covers all liability	Excluded	100

**Appendix II: Summary of Liability and
Indemnity Provisions in Commuter Rail
Agency and Freight Railroad Agreements**

Dollars in millions

Commuter rail agency	Class I railroad	Ownership^a	Is contract fault-based or no-fault?	What are provisions for freight-commuter collision?^b	Are specific types of conduct excluded or explicitly included?	What is the level of insurance that is required^c
Metra	Canadian Pacific Railway (CP)	Commuter	Combination ^l	No fault: each covers own (third parties shared)	Silent	Unspecified
Metra	CSX	Commuter	No fault	No fault: each covers own (third parties shared)	Silent	Unspecified
Metra	Norfolk Southern (NS)	Freight	No fault	No fault: each covers own (third parties shared)	Included	100
Metra	UP	Freight	Combination ^m	Fault-based	Included	200
Southern California Regional Rail Authority (Metrolink)	BNSF	Shared	Fault-based	Fault-based	N/A	150
Metrolink	UP	Shared	Combination ^o	No fault: each covers own (third parties fault-based)	Excluded	100
MTA Metro-North	NS	Freight	No fault	No fault: each covers own (third parties and passengers are fault-based)	Included	Unspecified
Metro-North	CSX	Commuter	No fault	No fault: each covers own equipment (passengers shared) ^o	Silent	Unspecified
Metro-North	CP	Commuter	No fault	No fault: freight covers own and 50 percent of other liability	Excluded	Unspecified
New Jersey Transit Corporation (NJT)	CSX ^p	Shared	No fault	No fault: each covers own (third parties shared)	Silent	100
NJT	NS	Shared	No fault	No fault: each covers own (third parties shared)	Silent	100
New Mexico Rail Runner Express	BNSF	Commuter, with freight easement ^q	No fault	No fault: commuter covers all liability	Silent	250 ^r

Appendix II: Summary of Liability and Indemnity Provisions in Commuter Rail Agency and Freight Railroad Agreements

Dollars in millions

Commuter rail agency	Class I railroad	Ownership^a	Is contract fault-based or no-fault?	What are provisions for freight-commuter collision?^b	Are specific types of conduct excluded or explicitly included?	What is the level of insurance that is required^c
Southeastern Pennsylvania Transportation Authority (SEPTA)	CSX	Shared	Combination ^s	No fault: each covers own (third parties and passengers are fault-based)	Silent	Unspecified
SEPTA	NS	Commuter	Combination ^t	No fault: each covers own (third parties and passengers are fault-based)	Silent	Unspecified
Sound Transit, Central Puget Sound Regional Transportation Authority	BNSF	Freight, with some commuter easements	No fault	No fault: each covers own (third parties shared)	Included	200
Trinity Railway Express (TRE)	UP	Commuter	Combination ^u	Fault-based (third parties shared)	Excluded	Unspecified
TRE	BNSF	Commuter	Combination ^v	Fault-based (third parties shared)	Silent	Unspecified
South Florida Regional Transportation Authority (Tri-Rail)	CSX	Commuter, with freight easements ^w	No fault	No fault: each covers own (third parties shared)	Included	125
Virginia Railway Express (VRE)	CSX	Freight	No fault	No fault: commuter covers all liability	Included	250
VRE	NS	Freight	No fault	No fault: commuter covers all liability	Included	250
Proposed commuter rail agencies^x						
Northstar	BNSF	Freight, with commuter easement	No fault	No fault: commuter covers all liability	Silent	200
SunRail	CSX	Commuter (contingent on legislative approval) ^y	No fault	No fault: each covers own (third parties shared)	Included	200

Source: GAO analysis of commuter and freight rail liability and indemnity provisions.

Note: Each row of this table represents a relationship, although there may be more than one contract governing this relationship. If the liability and indemnity provisions are the same, the contracts are not disaggregated. In cases where liability and indemnity provisions are different for different sections of shared use, then they are so noted. This table does not include details on provisions for liability for the discharge of hazardous substances.

**Appendix II: Summary of Liability and
Indemnity Provisions in Commuter Rail
Agency and Freight Railroad Agreements**

^aIndicates which party owns the tracks. If a commuter rail agency owns some sections of track and the freight railroad owns other sections and each entity hosts each other, then the ownership column is marked as shared.

^bThis column only describes provisions for collisions between freight and commuter trains. For this column, “each covers own” generally refers to liability for employees, equipment, and property. In the case of commuter rail agencies, the term also refers to passengers, although the definition of “passenger” and “third party” varies by agreement.

^cInsurance indicates minimum level of coverage, but does not address any self-insured retention the commuter railroad may decide to use to cover losses below a certain level.

^dACE owns 1,000 feet of track.

^eCaltrain’s contract with UP is no fault for liability levels up to \$25 million and fault-based for liability levels above \$25 million to \$125 million.

^fFault is based on which party is negligent.

^gFrontRunner and UP share tracks for 4.5 miles. On the rest of the system, they share a corridor, but each owns and exclusively uses its own tracks.

^hMARC is not liable for excluded conduct up to \$5 million, but this conduct is explicitly included for liability above \$5 million.

ⁱCSX and MBTA take liability for their own employees and property, regardless of fault, but liability for all other persons, including passengers, is assigned on the basis of fault.

^jConduct is excluded only for CSX property and employees in the case of gross negligence.

^kProvisions are generally no fault except in collision, but Metra covers all liability in excess of \$2 million.

^lFault-based provisions apply to some situations and could also result in allocating liability in a collision on the basis of fault.

^mProvisions are generally no fault except in collision.

ⁿMetrolink’s agreements with UP are no fault for liability levels up to \$25 million and fault-based in excess of \$25 million up to \$100 million or \$125 million depending on the tracks.

^oLiability for third parties depends on circumstances.

^pCSX operations are strictly through their part ownership of Conrail.

^qThe New Mexico Department of Transportation is the owner.

^rInsurance total includes a \$50 million escrow account.

^sCSX and SEPTA take liability for their own employees and property, regardless of fault, but liability for all other persons, including passengers, is assigned on the basis of fault.

^tNS and SEPTA take liability for their own employees and property, regardless of fault, but liability for all other persons, including passengers, is assigned on the basis of fault.

^uTRE indemnifies UP in a no-fault arrangement for passengers, and UP indemnifies TRE for accidents at crossings.

^vBNSF indemnifies TRE for accidents at crossings.

^wThe owner is the Florida Department of Transportation (FDOT). FDOT and CSX have an agreement to raise the insurance limits to \$200 million, pending legislative approval, as part of an agreement to purchase additional tracks for the Central Florida Commuter Rail, described in note y.

^xWe spoke with three other proposed commuter rail agencies: the Georgia Rail Passenger Program in Atlanta, Charlotte Area Transit System (CATS) in North Carolina, and TriMet Westside Express Service (WES) in Oregon. However, the Georgia Rail Passenger Program and CATS did not have finalized contracts for liability and indemnity, and WES had a contract with a non-Class I railroad.

^yThe owner will be FDOT, and CSX proposes to retain easements.

Appendix III: Summary of Liability and Indemnity Provisions in Commuter Rail Agency and Amtrak Agreements

Commuter rail agency	Ownership	Is contract fault-based or no fault?	What are provisions for Amtrak-commuter collision? ^a	Are specific types of conduct excluded or explicitly included? ^b
North County Transit District (Coaster)	Commuter	No fault	No fault: equipment and passengers shared, all other liability Amtrak except residual damage	Excluded
Connecticut Department of Transportation Shore Line East (SLE)	Amtrak	No fault	No fault: commuter covers all liability except Amtrak employees	Excluded
Delaware Department of Transportation (DelDOT) ^c	Amtrak	No fault	No fault under \$300,000: commuter covers all liability except Amtrak employees and intercity trains	Excluded
Florida Department of Transportation (FDOT) ^d	Commuter	Combination	Fault-based	Silent
MTA Long Island Rail Road	Amtrak	No fault	No fault: liability shared equally	Silent
Maryland Transit Administration (MARC)	Amtrak	No fault	No fault: commuter covers all liability except Amtrak commuter employees	Excluded
Massachusetts Bay Transportation Authority (MBTA)	Shared	No fault ^e	No fault: commuter covers all liability except Amtrak employees and Amtrak intercity operations	Excluded
MBTA	Commuter	No fault	No fault: Amtrak covers all liability	Excluded
Northeast Illinois Regional Commuter Railroad Corporation (Metra)	Amtrak ^f	Combination	Combination	Excluded
Metra	Commuter	No fault	No fault: commuter covers own equipment, employees and passengers and other residual damage, all other liability shared	Silent
Southern California Regional Rail Authority (Metrolink)	Commuter	No fault	No fault: each covers own, commuter covers third parties	Excluded
MTA Metro-North	Commuter	No fault	No fault: each covers own (third parties covered by Metro-North)	Silent
New Jersey Transit Corporation	Amtrak	No fault	No fault: commuter covers all liability except Amtrak employees	Silent
New Mexico Department of Transportation (NMDOT) ^g	Commuter	Fault-based	Fault-based	Silent
Rhode Island Public Rail Corporation ^h	Amtrak	No fault	No fault: commuter covers all liability	Silent
Southeastern Pennsylvania Transportation Authority (SEPTA) ^e	Amtrak	No fault	No fault: commuter covers all liability except Amtrak employees	Silent
Virginia Railway Express (VRE)	Amtrak	No fault	No fault: Amtrak covers all risk in exchange for risk fee except for VRE property	Silent

Source: Amtrak.

**Appendix III: Summary of Liability and
Indemnity Provisions in Commuter Rail
Agency and Amtrak Agreements**

^aThis column only describes provisions for collisions between commuter and Amtrak trains. For this column, “each covers own” generally refers to liability for employees, passengers, equipment, and property.

^b“Excluded conduct” means willful or wanton misconduct explicitly mentioned in contract.

^cSEPTA runs a “turnkey” service for DeIDOT on Amtrak-owned lines. DeIDOT indemnifies Amtrak for liability up to \$300,000 and pays a risk fee so Amtrak will absorb liability above \$300,000.

^dFDOT owns tracks in South Florida on which Tri-Rail and Amtrak operate.

^eAmtrak is responsible for all liability above \$75 million to \$200 million. MBTA assumes liability for its employees, equipment, and passengers, except when an incident is the result of Amtrak’s sole negligence or omission.

^fAmtrak owns about 2 miles of track around Chicago Union Station and has a fault-based contract for incidents at the station. On the Amtrak-owned track, excluded conduct is carved out.

^gNMDOT owns tracks over which Rail Runner and Amtrak operate.

^hMBTA runs a “turnkey” service for the Rhode Island Public Rail Corporation on Amtrak-owned lines.

Appendix IV: Summary of Key Case Law Addressing Liability and Indemnity Provisions

Federal Cases Addressing Enforceability of Liability and Indemnity Provisions

National Railroad Passenger Corp. v. Consolidated Rail Corp., 698 F. Supp. 951 (D.D.C. 1988), *vacated on other grounds*, 892 F.2d 1066 (D.C. Cir. 1990)

Conclusion: A U.S. District Court ruled that the indemnification provisions in an operating agreement between Amtrak and Conrail could not be enforced where there were allegations and a showing of gross negligence, recklessness, willful and wanton misconduct, intentional misconduct, or conduct so serious as to warrant the imposition of punitive damages.

Facts: Amtrak owned the segment of the Northeast Corridor that runs between Washington, D.C., and New York. Conrail used the Northeast Corridor pursuant to a freight operating agreement.

In January 1987, an Amtrak train collided with three Conrail freight locomotives that had entered the path of the high-speed Amtrak passenger train. The accident resulted in 16 deaths and more than 350 injuries. Just before crossing over onto the track being used by the Amtrak train, the Conrail engineer and brakeman in control of the Conrail locomotives had failed to heed a series of slow and stop signals at or before a track juncture near Chase, Maryland. The Conrail engineer admitted to the following: that the Conrail crew had recently used marijuana, was speeding, was operating a train in which the cab signal had been rendered inoperative because the light bulb had been removed from it, and was operating a train in which an audible warning device had been intentionally disabled. He also admitted that he had failed to call signals to his brakeman, as required by applicable safety regulations, that he had failed to maintain a proper lookout, and that he had not adhered to the cab signals or the wayside signals. The engineer pleaded guilty to manslaughter and was given the maximum penalty for manslaughter, 5 years imprisonment and \$1,000 in fines. The plaintiffs in many of the cases brought against Conrail and Amtrak alleged that Conrail or Amtrak or both committed reckless, wanton, willful, or grossly negligent acts and asserted entitlement to compensatory as well as punitive damages.

Amtrak brought this action before the court seeking a declaration of the rights and obligations of the parties with respect to the indemnifications of the freight operating agreement.

The operating agreement provided in part as follows:

“Amtrak agrees to indemnify and save harmless Conrail and Conrail Employees, irrespective of any negligence or fault of Conrail or Conrail Employees, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any Amtrak Employee, or for loss of, damage to, or destruction of the property of any such Amtrak Employee.

“Amtrak agrees to indemnify and save harmless Conrail and Conrail Employees, irrespective of any negligence or fault of Conrail or Conrail Employees, or howsoever the same shall occur or be caused, from any and all liability for injuries to or death of any Amtrak Passenger and for loss of, damage to, or destruction of any property of any such passenger.”

The issue presented in the case was “whether Amtrak must indemnify Conrail for any damages—compensatory, punitive or exemplary—arising out of the Chase accident that are founded upon reckless, wanton, willful, or grossly negligent acts by Conrail.”

The court found that the parties did not clearly manifest a mutual intent at the time they executed the freight operating agreement, or any previous agreement between the parties, for the indemnification provisions to apply to accidents caused by gross negligence, recklessness, or wanton and willful misconduct warranting the imposition of punitive damages. In addition, the court found that public policy would not allow enforcement of indemnification provisions that appear to cover such extreme misconduct because serious and significant disincentives to railroad safety would ensue. Under District of Columbia law, contractual provisions may be invalidated when they are contrary to public policy. Accordingly, the court ruled that Amtrak was not required to indemnify Conrail where there were allegations and a showing of gross negligence, recklessness, willful and wanton misconduct, intentional misconduct, or conduct so serious as to warrant the imposition of punitive damages.

Apfelbaum v. National Railroad Passenger Corp., No. 00-178, 2002 WL 32342481, 2002 U.S. Dist. Lexis 20321 (E.D. Pa. 2002)

Conclusion: The Southeastern Pennsylvania Transportation Authority (SEPTA) entered into a contract in which it indemnified Amtrak against any and all liability arising from the use of 30th Street Station in Philadelphia. Under Pennsylvania law, a party may bring a claim against the Commonwealth of Pennsylvania only if the basis for the claim falls within one of the exceptions to immunity enumerated in the Pennsylvania

Sovereign Immunity Act. The U.S. District Court for the Eastern District of Pennsylvania found that the claim by the plaintiff did not fall within one of the statutory exceptions to immunity. Accordingly, the court found that the contractually negotiated indemnity agreement was unenforceable, stating that a Commonwealth agency could not waive its sovereign immunity by any procedural device, including a contract, and expose itself to liability prevented by the legislature.

Facts: An individual alleged that she slipped and fell in the 30th Street Station in Philadelphia, Pennsylvania. The 30th Street Station is owned by Amtrak and a portion is leased to SEPTA through a lease agreement. As part of the lease agreement, SEPTA agreed to indemnify Amtrak against any and all liability arising from or in connection with the use or occupation of 30th Street Station. The plaintiff named several defendants, including SEPTA, Amtrak, and the cleaning service companies responsible for maintaining the station. SEPTA moved for summary judgment claiming sovereign immunity. The other defendants argued that SEPTA waived its sovereign immunity when it agreed to indemnify Amtrak. Under Pennsylvania law, the Commonwealth of Pennsylvania enjoys immunity from suit except when the General Assembly has, by statute, expressly waived the immunity. The court found that because the alleged dangerous condition resulting in injury was not caused by a defect in the property owned by Pennsylvania, the claim did not fall within any of the nine exceptions to immunity enumerated in the Pennsylvania Sovereign Immunity Act. Accordingly, the court found that the indemnity agreement was unenforceable.

Maryland Transit Admin. v. National Railroad Passenger Corp.,
372 F. Supp. 2d 478 (D. Md. 2005)

Conclusion: Pursuant to an operating agreement between the Maryland Transit Administration (MTA) and Amtrak, MTA had agreed to indemnify Amtrak for any liability except that which was caused by the gross negligence of Amtrak. An arbitration panel found Amtrak's actions to be grossly negligent. The court, however, upheld a second arbitration panel's ruling that MTA was responsible for providing Amtrak with the insurance coverage specified in the agreement notwithstanding the first arbitration panel's finding that Amtrak was grossly negligent.

Facts: An Amtrak passenger train proceeded through a stop indication and collided with a commuter train, causing significant damage. An arbitration panel found that an Amtrak engineer was guilty of gross negligence in causing the collision, and on the basis of language of the operating

agreement, determined that MTA was relieved of any responsibility to indemnify Amtrak. The agreement essentially provided that MTA agreed to indemnify Amtrak for any liability that would not have arisen but for the existence of the commuter rail service, except for any liability that was caused by the gross negligence of Amtrak.

A second arbitration panel independently found that MTA was responsible for providing insurance coverage to Amtrak notwithstanding the fact that Amtrak was found to be grossly negligent by the first arbitration panel.

Amtrak sought confirmation from the United States District Court that MTA was required to provide insurance coverage to Amtrak notwithstanding the Amtrak engineer's gross negligence, and MTA petitioned to vacate this award.

The court confirmed the arbitration panel's finding regarding MTA's responsibility to provide insurance to Amtrak.

O&G Industries v. National Railroad Passenger Corp., 537 F.3d 153 (2d Cir. 2008), *petition for cert. filed* (U.S. Jan. 14, 2009) (No. 08-895)

Conclusion: The United States Court of Appeals for the Second Circuit held that a Connecticut statute that nullifies indemnity agreements insulating a party from its own negligence was preempted to the extent that it conflicted with 49 U.S.C. § 28103 (the provision of the Amtrak Reform and Accountability Act of 1997 that states that a provider of passenger rail transportation may enter into contracts that allocate financial responsibility for claims).

The jury in the lower-court case found that Amtrak's conduct was not reckless and Amtrak was not required to pay punitive damages, but the court held that even if the jury had found Amtrak's conduct to be reckless, O&G Industries (O&G) would still be required to indemnify Amtrak. The court stated that it was the intent of Congress to allow Amtrak to enter into indemnity agreements with respect to any claims against Amtrak. The court also held that Amtrak could be indemnified against third party as well as passenger claims.

Facts: O&G, a commercial construction company, contracted with the Connecticut Department of Transportation to perform work related to I-95 as it passed over Amtrak's tracks in East Haven. Amtrak and O&G entered into a contract that permitted O&G to enter onto Amtrak property to perform the work. In the contract, O&G agreed to indemnify Amtrak. The

indemnity agreement stated essentially that O&G would indemnify Amtrak irrespective of its negligence or fault from any and all losses and liabilities “arising out of in any degree directly or indirectly caused by or resulting from activities of or work performed by [O&G].” The agreement also stated that O&G would not indemnify Amtrak where the negligence or fault of Amtrak was the sole causal fault of Amtrak, except for injury or death of employees of Amtrak and its contractors.

An Amtrak train struck and killed an O&G employee who was working on the bridge.

Amtrak brought a suit against O&G for indemnification. O&G argued that Amtrak’s claim for contractual indemnification was barred by Connecticut General Statute § 52-572k and Connecticut public policy. The statute, based on public policy considerations, bars indemnification agreements in construction contracts that shield a party from its own negligence.¹ Amtrak responded that 49 U.S.C. § 28103, which permits Amtrak to enter into indemnification agreements, preempted the Connecticut statute.

The jury found that Amtrak was not reckless and so only had to pay compensatory damages and not punitive damages. The jury also found, however, that Amtrak had breached a material term of the contract by failing to safely operate its train in the area of the work site, relieving O&G from an obligation to indemnify Amtrak.

Amtrak moved for a judgment as a matter of law that O&G must indemnify it. Amtrak stated that notwithstanding the jury verdict, the facts of the accident fell within the wording of the indemnification agreement, and that O&G was legally obligated to indemnify Amtrak. The lower court agreed and required O&G to indemnify Amtrak.

O&G appealed its case to the United States Court of Appeals for the Second Circuit. The court held that the Connecticut statute that nullified indemnity agreements that insulated a party from its own negligence was preempted to the extent that it conflicted with federal law, and the facts of

¹On appeal, Amtrak claimed that the Connecticut statute applied only to construction contracts, and that the contract at issue was not a construction contract. Because Amtrak did not contest the applicability of the Connecticut statute during the lower-court proceedings, the Second Circuit held that Amtrak had waived that argument and could not raise it on appeal.

the accident fell within the wording of the indemnification agreement so that O&G was legally obligated to indemnify Amtrak.

In addition, the court held that even if the jury had found Amtrak's conduct to be reckless, O&G would still be required to indemnify Amtrak. The court stated that 49 U.S.C. § 28103(b), the provision in the Amtrak Reform and Accountability Act of 1997 that authorizes a provider of rail passenger transportation service to enter into contracts that allocate financial responsibility for claims, legislatively overruled the opinion in *National Railroad Passenger Corp. v. Consolidated Rail Corp.* ("Conrail"), 698 F. Supp. 951 (D.D.C. 1988) (invalidating an agreement to indemnify for losses caused by the indemnitee's gross negligence, as contrary to District of Columbia public policy), *vacated on other grounds*, 892 F.2d 1066 (D.C. Cir. 1990). The court stated the following:

"As Judge Dorsey correctly noted in granting summary judgment to Amtrak, it was precisely the doubts cast by the Conrail decision over the validity of indemnity agreements by railroad parties that prompted Congress to enact § 28103(b) The broad, unqualified language in § 28103(b) leaves no doubt as to the specific intent of Congress to sanction indemnity arrangements between Amtrak 'and other parties' with respect to any claims against Amtrak. See S.Rep. No. 105-85, at 5 (1997)."

Deweese v. National Railroad Passenger Corp., 2009 WL 222986, 2009 U.S. Dist. LEXIS 6451 (E.D. Pa. 2009) (Memorandum of Decision)

Conclusion: The U.S. District Court for the Eastern District of Pennsylvania held that 49 U.S.C. § 28103 preempted Pennsylvania's sovereign immunity statute. The court upheld the validity of the indemnification agreements between Amtrak and the Southeastern Pennsylvania Transportation Authority (SEPTA). SEPTA has argued that it did not have the power to waive its sovereign immunity and that this issue was previously litigated in favor of SEPTA and against Amtrak in *Apfelbaum v. National Railroad Passenger Corp.*, 2002 WL 3234281, 2002 U.S. Dist. Lexis 20321 (E.D. Pa. 2002), and collateral estoppel precluded Amtrak from litigating it again.² Amtrak conceded that the Commonwealth did not have the power to waive its sovereign immunity and that the issue had been fully litigated, but instead argued that the sovereign immunity of

²Collateral estoppel is a doctrine barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.

the Commonwealth had been preempted by 49 U.S.C. § 28103(b). The court agreed with Amtrak and against SEPTA.

Facts: The plaintiff, Deweese, went to the Crum Lynne train station in Ridley Park, Pennsylvania to board a SEPTA train bound for Philadelphia. When he arrived at the station, he learned that he had to board the train from the tracks on the opposite side of where he had entered the station. He attempted to cross the tracks and was struck by an Amtrak train, resulting in serious injuries. Amtrak owned the Crum Lynne station and SEPTA leased the station from Amtrak. The railroad tracks at the station were owned by Amtrak as well. As part of the lease agreement between Amtrak and SEPTA, SEPTA agreed to indemnify Amtrak for all liability which would not have occurred but for the existence of the commuter service provided by SEPTA. The agreement for access to the railroad tracks contained a similar provision.

State Cases Addressing Enforceability of Liability and Indemnity Provisions

Mass Transit Administration v. CSX Transportation Inc., 708 A.2d 298 (Md. 1998)

Conclusion: The Court of Appeals of Maryland held that a Maryland statute (which provides that an indemnification in a contract pertaining to construction is void and against public policy if the party indemnified is negligent) applies only to construction contracts, not to indemnification provisions in procurement contracts. Accordingly, the Mass Transit Administration (now the Maryland Transit Administration) was required to indemnify CSX Transportation (CSX).

Facts: A Maryland Rail Commuter (MARC) train operated by CSX struck a backhoe that was performing maintenance on the track. The operator of the backhoe was a CSX contractor. No one was injured. The backhoe operator sued CSX for the value of the backhoe, and the parties settled. CSX then claimed indemnification from MTA, of which MARC is a part. MTA argued that the indemnification provision in the commuter rail passenger service agreement between CSX and MTA was void based on the Maryland statute that provides that an indemnification in a contract pertaining to the construction, alteration, repair, or maintenance of a building, structure, appurtenance, or appliance for damages arising from the negligence of the party indemnified is against public policy and is void and unenforceable.

The Court of Appeals of Maryland held that MTA was required to indemnify CSX. The court stated that the Maryland statute applies only to

construction contracts, not to indemnification provisions in procurement contracts, and the contract did not become a construction contract because of the collision between a train and a backhoe.

Pacific Insurance Co. v. Liberty Mutual Insurance Co., 956 A.2d 1246 (Del. 2008)

Conclusion: The Supreme Court of Delaware held that the insurance policy providing Conrail with coverage would not violate a Delaware statute providing that public policy precludes contractual indemnification for a party's own negligence. The court held that the insurance purchased to protect Conrail, once issued, could not be held unenforceable against Conrail.

Facts: Conrail is the only rail entity in this case, but the case is relevant in that it holds if a state law prohibits indemnification for certain types of conduct, insurance provisions still must be honored if this type of conduct occurs. This case involved an insurance coverage dispute that arose from fatal accidents that occurred on a railroad crossing owned by Conrail during a road construction project carried out by the Delaware Department of Transportation. Two wrongful death actions were filed as a result. These actions were settled, but a dispute over coverage under two insurance policies remained. One of the insurance companies argued, among other things, that it was not required to provide the contractual coverage because of a state statute that precluded contractual indemnification for a party's own negligence. The court held that the insurance purchased to protect Conrail, once issued, could not be held unenforceable against the indemnified party, even where the party was found to be negligent.

Massachusetts Bay Transportation Authority and Massachusetts Bay Commuter Railroad Co. v. CSX Transportation Inc. and Cohenno Inc. (Super. Ct. Civ. Action 2008-1762-BLS1) (Memorandum and Order on Defendant CSX Transportation, Inc.'s Motions to Dismiss)

Conclusion: The Business Litigation Session of the Massachusetts Superior Court held that provisions that indemnify CSX are unenforceable on the basis of the Massachusetts common law to the extent that the contractual provisions indemnify CSX against its own gross negligence or reckless or intentional conduct.

Facts: In March 2008, a freight car that had been delivered by CSX to a shipping depot rolled down the siding at the top of a hill, where it crashed into a commuter train with roughly 300 passengers, injuring many.

The 1985 trackage rights agreement between the Massachusetts Bay Transportation Authority (MBTA) and CSX states that MBTA will indemnify CSX “irrespective of any negligence or fault . . . from any and all liability, damage, or expense of any kind” arising out of damages or injury to any MBTA employee or other contractor of MBTA or out of damage to MBTA property.³ MBTA, and its contractor MBCR, filed a lawsuit with the Business Litigation Session of the Massachusetts Superior Court seeking a declaration that CSX was liable for the damages arising from the accident. CSX filed a motion to dismiss for failure to state a claim.

The court held that under Massachusetts common law, contracts that relieve a party of responsibilities in cases of gross negligence or willful misconduct are against public policy and are not enforceable. The court stated that it was governed by controlling appellate authority holding that a party may not shield itself from liability for gross negligence or reckless or intentional conduct.⁴ The court, however, citing Massachusetts case law, stated that it is not contrary to public policy to exempt a party from its own simple negligence.⁵ The court stated that a party, in the absence of unconscionable conduct, can contractually exempt itself from liability from negligence. Accordingly, the court held that the agreement was valid to the extent that it indemnified CSX for negligence, and invalid to the extent that it indemnified CSX for gross negligence or reckless or intentional conduct.

³The agreement also provides that the party whose negligence caused injury to any person will indemnify the other party. CSX contended that this issue had not yet become ripe. The court disagreed but did not determine as part of this proceeding, which party, if either, was negligent.

⁴See *Zavras v. Capeway Robers Motorcycle Club*, 44 Mass. App. Ct. 17, 18-19 (1997); *HR Knowledge, Inc. v. Professional Insurance & Risk Brokerage*, 71 Mass. App. Ct. 1127 (Memorandum and Order Pursuant to Rule 1:28) (2008).

⁵See *Cornier v. Central Mass. Chapter of the National Safety Council*, 416 Mass. 286, 287-289 (1993).

Surface Transportation Board Decisions Addressing Enforceability of Liability and Indemnity Provisions

The Rail Passenger Service Act of 1970 provides that Amtrak and freight railroads may contract for Amtrak's use of the freight railroads' facilities. If the parties cannot agree upon a contract, the Surface Transportation Board (STB) may order access and prescribe the terms and conditions of the contract, including compensation.

Application of the National Railroad Passenger Corp. under 49 U.S.C. 24309(a) — Springfield Terminal Railway Co., Boston and Maine Corp. and Portland Terminal Co., 3 S.T.B. 157 (1998)

Conclusion: Amtrak petitioned STB to set terms and compensation for Amtrak's use of track owned by the freight railroads in the Guilford Rail System. Amtrak agreed to indemnify the freight railroads for certain standard risks. STB determined that other residual damages arising out of Amtrak's operations were an incremental cost for which Guilford was entitled to compensation. In addition, STB refused to require Amtrak to reimburse the freight carriers from damages due to the freight carriers' gross negligence, recklessness, or wanton or willful conduct.

Facts: Amtrak petitioned STB to set the terms and compensation for Amtrak's use of freight carriers' lines to provide passenger service between Boston and Portland, Maine.

Amtrak asked STB, in prescribing the terms and conditions, to adopt Amtrak's standard liability agreement with freight railroads, known as section 7.2. This section essentially allocates liability on a no-fault basis, that is, Amtrak agrees to indemnify the host railroad against liability resulting from any damages that occur to Amtrak employees, equipment, and passengers, regardless of fault, and the host railroad agrees to indemnify Amtrak against any liability resulting from damages to the host railroad's employees or equipment, regardless of fault.

In the proposed agreement at issue in this case, Amtrak agreed to assume full responsibility for the following types of damages: (1) injury or death to Amtrak employees or damage to their property, (2) injuries or death to Amtrak passengers and damage to their property, (3) damage to Amtrak equipment or property, and (4) injuries or death to any person or damage to property (other than property of Guilford and of its employees) proximately caused as a result of a collision of a vehicle or a person with an Amtrak train at a grade crossing.

Amtrak proposed that the freight carriers assume liability for the following types of damages that could occur because of Amtrak's presence on the tracks, in return for a payment of approximately \$17,000 per year:

- injury to trespassers and licensees;
- general indirect damages, such as environmental damage to houses near the tracks; and
- injuries or death to Guilford employees or damage to their property or to the property of Guilford.

STB found that the liability for these "residual damages" arising out of Amtrak operations was an incremental cost for which the carriers were entitled to compensation. STB directed Amtrak to either

- fully indemnify the freight railroad for the residual damage categories, as it had agreed to do for other damage categories;
- purchase insurance to cover the freight carrier's assumption of liability for all such costs (i.e., without deductibles or low caps, even if that required the purchase of more than one policy); or
- combine the first two methods (by, e.g., purchasing insurance with a deductible or low cap, but agreeing to indemnify the freight railroads for damages that were subject to the deductible or cap).

In addition, STB would not require Amtrak to reimburse the freight carriers from damages due to the freight carriers' gross negligence, recklessness, or wanton or willful conduct. STB stated that statute requires that compensation levels reflect safety considerations,⁶ and thus the freight carriers should be encouraged to conduct the operations safely. It also stated that public policy generally disfavors requiring one party to be responsible for another's gross negligence or willful and wanton misconduct.

⁶As an example of a statute requiring that compensation levels reflect safety considerations, STB cited 49 U.S.C. § 10101 (3), (8) (part of the federal government's rail transportation policy), which requires STB to "promote a safe and efficient transportation system" and "operate facilities and equipment without detriment to the public health and safety."

Boston and Maine Corp. and Springfield Terminal Railway Co. v. New England Central Railroad, STB Finance Docket No. 34612 (2006)

Conclusion: STB held that the indemnity provision in the operating agreement between Boston and Maine (B&M) and the New England Central Railroad (NECR) could not be used to indemnify NECR, which had been found to be grossly negligent, since such an interpretation would “contravene well-established precedent that disfavors such indemnification provisions” and would be contrary to the rail transportation policy, which requires STB to “promote a safe and efficient transportation system” and “operate facilities and equipment without detriment to the public health and safety.”

Facts: Pursuant to a previous Interstate Commerce Commission (ICC)⁷ order, B&M conveyed its “Connecticut River Line” to Amtrak subject to Amtrak’s granting B&M trackage rights on the line. Amtrak transferred the line to the Central Vermont Railway, which subsequently was purchased by NECR. NECR also took over the trackage agreement.

A B&M train operating over the Connecticut River Line derailed. B&M sued NECR for breach of contract and tortious injury due to gross negligence, recklessness, and willful misconduct concerning NECR’s alleged failure to maintain the line. NECR responded that any claims based on the condition of the track were barred by section 7.1 of the trackage rights order issued by ICC.⁸ B&M argued that NECR’s interpretation of section 7.1 was contrary to public policy because it would apportion all responsibility for the derailment to B&M even if the derailment was caused solely by grossly negligent, reckless, or willful misconduct by NECR. STB was called upon to determine whether ICC intended section 7.1 to indemnify for gross negligence.

⁷ICC was the predecessor to STB.

⁸Section 7.1 of the Trackage Rights Order provides (6 I.C.C.2d at 564): “Save as herein otherwise provided, each party hereto shall be responsible for and shall assume all loss, damage or injury (including injury resulting in death) to persons or property, including the cost of removing any trackage, repairing trackage and correcting environmental damage, which may be caused by its engines, cars, trains or other on-track equipment (including damage by fire originating therefrom) whether or not the condition or arrangement of the trackage contributes in any manner or to any extent to such loss, damage or injury, and whether or not a third party may have caused or contributed to such loss, damage or injury, and for all loss or damage to its engines, cars, trains or other on-track equipment while on said trackage from any cause whatsoever, except in the case of collision, in which event the provisions of Section 7.2 shall apply.”

STB held that section 7.1 should not be construed to absolve NECR of gross negligence since such an interpretation would “contravene well-established precedent that disfavors such indemnification provisions” and would be contrary to provisions in the federal government’s rail transportation policy that require STB to “promote a safe and efficient transportation system” and “operate facilities and equipment without detriment to the public health and safety.”⁹

⁹49 U.S.C. § 10101 (3), (8).

Appendix V: GAO Contact and Staff Acknowledgments

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Staff Acknowledgments

In addition to the contact named above, Nikki Clowers, Assistant Director; Alana Finley; Brandon Haller; Hannah Laufe; Nancy Lueke; and Aron Szapiro made key contributions to this report.

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