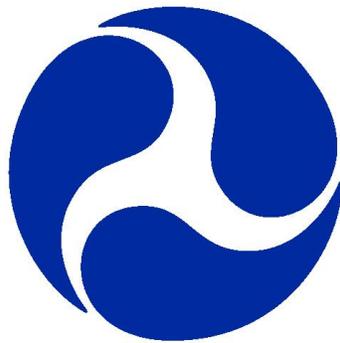


Report to Congress

Shared-Use of Railroad Rights-of-Way



July 2019

Federal Railroad Administration
U.S. Department of Transportation

Shared-Use of Railroad Rights-of-Way

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Shared-Use of Railroad Rights-of-Way

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Abbreviations, Acronyms, and Phrases in this Report

ACE	Altamont Corridor Express
AAR	Association of American Railroads
ARAA	<i>Amtrak Reform and Accountability Act of 1997</i> , Public Law (P.L.) 105-134
ASLRRA	American Short Line and Regional Railroad Association
The Department	U.S. Department of Transportation
FAST Act	<i>Fixing America's Surface Transportation Act</i> , P.L. 114-94
FRA	Federal Railroad Administration
FY	Fiscal Year (October 1 to September 30)
NEC	Northeast Corridor, rail line between Boston, Massachusetts, and Washington, D.C.
OTP	On-Time Performance
P.L.	Public Law
PRIIA	<i>Passenger Rail Investment and Improvement Act of 2008</i> , P.L. 110-432
RPSA	<i>Rail Passenger Service Act of 1970</i> , P.L. 91-518
RPA	Rail Passengers Association
RSIA	<i>Rail Safety Improvement Act of 2008</i> , P.L. 110-432
SJRRC	San Joaquin Regional Rail Commission
STB	Surface Transportation Board
U.S.C.	United States Code
U.S. DOT	U.S. Department of Transportation

Chapter 1. Introduction

This report responds to a provision in the *Fixing America’s Surface Transportation Act of 2015* (FAST Act) that directed the U.S. Secretary of Transportation to evaluate passenger and freight rail systems’ shared-use of railroad rights-of-way and the operational, institutional, and legal structures that would best support improvements to the shared-use of the U.S. rail network.¹ Many of these issues reflect over 40 years of federal laws (Appendix A), regulations, and business negotiations among affected parties. Reviewing these parameters helps ensure the U.S. rail system can fulfill the passenger and freight mobility demands of our growing population and economy.

To consult with stakeholders as the FAST Act directed, Federal Railroad Administrator Ronald L. Batory asked the Surface Transportation Board (STB), Northeast Corridor (NEC) Commission, State-Amtrak Intercity Passenger Rail Committee, and Amtrak for their input (Appendix B). In addition, Administrator Batory consulted stakeholder associations for their input (Table 1). This report focuses on summary findings from the Congressionally-directed organization outreach.

Table 1. Stakeholder Associations Contacted on Shared-Use Study Areas

Association	Relevant Stakeholders Represented
American Association of State Highway and Transportation Officials	State governments
Association of American Railroads (AAR)	Large railroad carriers that own rail infrastructure over which both passenger and freight trains operate
American Public Transportation Association	Commuter rail passenger transportation authorities
American Short Line and Regional Railroad Association (ASLRRA)	Smaller railroad carriers that own rail infrastructure over which both passenger and freight trains operate
Rail Passengers Association (RPA)	Rail passengers and customers

This report summarizes the responses from STB, Amtrak, AAR, ASLRRA, RPA, and the San Joaquin Regional Rail Commission (SJRRRC). The other stakeholders did not respond.

Presentation herein of the responses does not imply FRA agrees or disagrees with the respondents’ points of view, assertions, positions, or recommendations.

This report is organized by the study areas the FAST Act directed the Secretary to evaluate (Table 2).

¹ Section 11311, P.L. 114-94, December 4, 2015.

Table 2. Report Organization and Study Areas

Chapter	Study Area
2	Access and use of railroad rights-of-way by a rail carrier that does not own the right-of-way, including access agreements, access costs, and dispute resolution
3	Effectiveness of existing statutory, regulatory, and contractual mechanisms for establishing, measuring, and enforcing train performance standards, including how delays are recorded and assigned and use of incentives and penalties
	Strengths and weaknesses of existing train performance assurance mechanisms and possible approaches to address the weaknesses
4	Mechanisms for measuring and maintaining public benefits from publicly funded rail improvements
5	Approaches to operations, capacity, and cost estimation modeling that enable transparent decision making and protect proprietary interests
6	Liability requirements and arrangements, including whether to (a) revise or expand statutory limits to other parties and (b) establish alternative insurance models and minimum insurance requirements for passenger operators
7	Effects on rail passenger services, operations, liability limits, and insurance levels by a State’s assertion of sovereign immunity

Chapter 8 summarizes the respondents’ recommendations for consideration by Congress and stakeholders.

Chapter 2. Access to and Use of Railroad Rights-of-Way

In the 1830s when railroads began operating in the United States, no distinction existed between freight railroads and passenger railroads. They were simply railroads that were operationally integrated to carry both freight and passengers. Railroads enabled much of the Nation's westward expansion as they provided essential movements of both people and goods. Questions about access and the use of railroad rights-of-way predate Federal regulation of the railroads under the *Interstate Commerce Act of 1887*.² The Act requires railroads to provide transportation to all parties upon reasonable request, known as *common carrier* requirements. Part of the policy justification for requiring railroads to provide public interest transportation was that railroads also received the right of eminent domain over private property and land grants for assembling rights-of-way. While Congress has modified common carrier obligations many times since 1887, they continue to exist in law to this day.³

In the 1950s and 1960s with growing usage of – and federal investments in – highway, waterway, and aviation transportation of passengers and freight, railroads struggled to compete and lost significant market share. Continued losses in the railroads' passenger operations compounded these issues. During this time, many railroads filed for bankruptcy, including the nation's largest bankruptcy at the time, the Penn Central Transportation Company. It was in this context that over a decade Congress passed a series of measures intended to revitalize the rail industry. First, Congress created Amtrak⁴ in the *Rail Passenger Service Act of 1970* (RPSA)⁵ both to relieve the railroads of their common carrier obligation to provide passenger rail service and to create a national intercity passenger rail provider. Under RPSA, railroads could exit their common carrier obligation to operate passenger rail services and the newly-created Amtrak was granted access rights to their lines at *incremental cost*. Thus, while the railroads gained the ability to cease operating passenger trains, they were responsible for allowing Amtrak access to the infrastructure over which it operates. This legislative construct remains in effect today.⁶

Since Amtrak operated its first train in May 1971, railroad companies have been considered largely either freight or passenger rail carriers. Despite their common history, Amtrak and freight railroads often disagree over what *access rights* mean in practice. The majority of access disputes concern either the meaning of *incremental cost* or how to provide *preference* to passenger trains (see chapter 3 for a discussion on preference).

² P.L. 49-104. [Appendix A](#) lists Federal laws referenced in this report.

³ 49 U.S.C. 11101.

⁴ Officially, the National Railroad Passenger Corporation.

⁵ P.L. 91-518.

⁶ 49 U.S.C. 24308.

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Similar disputes exist on the Northeast Corridor (NEC), the busiest rail corridor in the United States, which is located between Boston, Massachusetts, and Washington, D.C. Most NEC access disputes revolve around peak travel hour capacity between the passenger rail providers – eight commuter operators and Amtrak. Several freight railroads operate on the NEC, but they generally operate at night. NEC rail lines are owned by Amtrak, State of Connecticut, Massachusetts Bay Transportation Authority, and Metro-North Railroad, following the Penn Central Transportation Company bankruptcy and enactment of the *Railroad Revitalization and Regulatory Reform Act of 1976* (also known as the 4R Act).⁷

Another significant development in rail access issues occurred with enactment of the *Staggers Act of 1980*.⁸ The Act is widely viewed as having deregulated, and thereby saved, the U.S. freight rail industry, enabling it to become one of the world's most efficient transportation networks. The Act encouraged the sale, rather than abandonment, of light-density lines to preserve rail service. The number of Class II and III railroads – also known as regional and short line railroads – grew from less than 300 in 1980 to more than 750 in 2018.⁹ On some short line railroads' track, passenger rail operations are more frequent than freight operations.

States also have a substantial role in determining rail access, because they are rail infrastructure owners, operators, and investors in freight and passenger rail. Twenty-one state transportation departments and other state-authorized entities fund 29 intercity passenger rail routes, and nearly all states fund rail infrastructure improvements.

The following paragraphs summarize the responses about these issues to Administrator Batory's letter. The full responses are in the appendices to this report.

Surface Transportation Board (Appendix C)

STB's response describes its regulatory authority involving Amtrak, other passenger rail operators, and some railroad right-of-way matters. STB has the authority to ensure Amtrak's right to operate over other railroads' tracks and Amtrak's statutory right of *preference*. STB also has jurisdiction over passenger rail carriers that operate across state lines as part of the interstate rail network. STB is involved in the freight railroads' voluntary sale of rail assets to public entities seeking to improve commuter rail operations and in cases related to trackage rights agreements and the use of terminal facilities.

Dispute resolution: STB can prescribe reasonable terms and compensation related to shared-use of track and other facilities, if Amtrak and other entities cannot reach a voluntary agreement. STB may resolve disagreements between Amtrak and state entities related to the

⁷ P.L. 94-410.

⁸ P.L. 96-448.

⁹ FRA data.

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allocation of costs for Amtrak's state-supported services and NEC operations, maintenance, and capital needs.

Amtrak (Appendix D)

Amtrak's response summarizes the statutory basis for its operation on shared-use corridors with a focus on RPSA. Amtrak asserts that RPSA and subsequent amendments¹⁰ provide Amtrak with rights that enable it to fulfill its statutory mission, including *incremental cost* access to any U.S. rail line, other railroad facilities, and services; *preference* over freight trains; the right to operate additional trains; and condemnation authority to secure necessary assets for reasonable compensation, if negotiations fail.

Access agreements as a tenant: Amtrak agreements evolved from a single *basic agreement* and now Amtrak has operating agreements with 29 host railroads (17 freight railroads and 12 state transportation departments and regional transportation authorities). The agreements govern Amtrak's day-to-day operations on 95 percent of its route system and 72 percent of its train-miles. The agreements typically address the host's provision of facilities and services, track maintenance, schedules and speeds, compensation based on *incremental costs*, incentive payments for on-time performance (OTP), dispute resolution, and liability.

Access agreements as a host: Amtrak has agreements with the commuter agencies and freight railroads that Amtrak hosts on its NEC and other rail lines. Two laws highlight governing relations on the NEC between Amtrak and its tenants: the 4R Act, which applies to commuter operations that existed in 1976, and the *Passenger Rail Investment and Improvement Act of 2008* (PRIIA), which established the NEC Commission¹¹ and cost allocation policy for sharing operating, maintenance, and capital costs.¹² Amtrak maintains agreements with the freight railroads that operate on Amtrak-owned or operated rail lines, for which Amtrak receives tenant payments.

Access costs: Amtrak's *incremental cost* payments to host railroads are based on incremental maintenance costs and wages and benefits of the host railroad personnel who provide services to Amtrak.

¹⁰ 49 U.S.C. 24308.

¹¹ The statutory Commission promotes cooperation and planning pertaining to rail operations, infrastructure investments, and related activities. Voting membership consists of one representative of each NEC State and the District of Columbia, four representatives of Amtrak, and five representatives of U.S. DOT. The Commission also includes non-voting representatives from four freight railroads, states with feeder corridors, and commuter authorities not directly represented by a commission member.

¹² Section 212, P.L. 110-432.

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Dispute resolution: Amtrak uses several dispute resolution mechanisms as both a host and a tenant (Table 3). A major barrier to the resolution of disputes is the expense and time of the STB adjudication process.

Table 3. Amtrak Dispute Resolution Mechanisms

Mechanism	Parties and Issues
STB	Access or compensation to host freight railroads and freight and commuter railroads' access to or compensation for Amtrak-owned facilities
NEC Cost Allocation Dispute Resolution Policy	NEC infrastructure owners and users
National Arbitration Panel	Host freight railroads about contractual matters
Arbitration or Litigation	Commuter railroads

Association of American Railroads (Appendix E)¹³

Access agreements and costs: AAR's response states that separate corridors for freight and passenger rail would be desirable but recognizes that the two services will continue to share tracks and rights-of-way for the foreseeable future. AAR asserts that shared-use of corridors must be based on voluntary agreements negotiated on a case-by-case basis to address corridor- and service-specific issues. AAR acknowledges Amtrak's statutory right of access to freight railroad infrastructure and notes this right does not extend to other passenger operators. According to AAR's response, four principles must be part of any shared-use arrangement:

- **Safety**: Freight and passenger railroads must make safety a priority, including mitigation of risks related to grade crossings, stations, separation of tracks, train control systems, and track and bridge maintenance and improvements.
- **Compensation**: Freight railroads should be fully compensated for all hosting costs, including consumption of rail capacity, additional required infrastructure, new service planning, and higher speeds and frequencies desired by passenger railroads. Additionally, passenger schedules must be reasonably achievable and updated regularly as operations and traffic change.
- **Access and Capacity**: Passenger rail use of freight corridors cannot impair present or future freight rail customers; efforts to advance passenger rail at the expense of freight

¹³ In its response to Administrator Batory's letter, AAR specifies that its comments reflect the perspectives only of its freight railroad members and not its passenger rail members (which include Amtrak and commuter railroads).

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rail would be harmful to the public interest. AAR also seeks to preserve the ability of freight trains to operate as needed and expand as freight transportation demand grows.

- Liability: Host railroads must continue to be protected from liability risks associated with passenger rail service (see Chapter 6 on liability).

American Short Line and Regional Railroad Association (Appendix F)

Access agreements and costs: ASLRRRA's response states that access agreements can address the impacts of shared-use on freight operations, if the parties negotiate under three conditions:

1. Freight rail has priority;
2. The passenger operator is liable for all costs borne by the freight operator *but for* the presence of passenger rail, regardless of whether negligence or other fault contributed to the costs; and
3. The passenger operator must provide insurance that covers the freight railroad as a *named insured*.

Absent these conditions and protections, freight operators would be subsidizing passenger operations, according to ASLRRRA's response. ASLRRRA recognizes that its condition 2, in particular, might be difficult for all parties to accept. Freight rail carriers must be fully compensated for any costs or liability that would not have existed *but for* the presence of passenger rail on a corridor, including any disruptions and adjustments needed to initiate and accommodate passenger operations. This approach is necessary and reasonable, if the intent of the passenger rail service is to foster a public service on a private rail right-of-way, according to ASLRRRA's response.

Further, ASLRRRA's response says that if the Federal Railroad Administration (FRA) concludes statutory authority is needed to encourage passenger rail growth, FRA must ensure that freight rail preeminence and *but for* risk sharing preempts any rule or law to the contrary.

ASLRRRA's response states that FRA should conduct a risk analysis to determine whether shared-use is a risk to safety. The analysis can conclude whether shared operations should be mandated and under what conditions, or whether freight carriers should have sole discretion to decide upon shared-use operations.

Rail Passengers Association (Appendix G)

RPA's response discusses shared-use access in the context of growing passenger rail service in the United States. It states that the separation of passenger and freight traffic should be the primary goal and notes the need for a rational system for granting access and a standard

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dispute resolution mechanism. RPA also proposes creation of a federal grant program to fund the purchase of the freight railroads' abandoned and underutilized corridors.

Other access models: RPA's response states that the conflicts between freight and passenger rail are rooted in the freight railroads' need for long trains with infrequent schedules and passenger railroads' desire for short trains with high frequencies at regular intervals. RPA outlines a negotiating model as one approach to reducing freight/passenger conflicts.¹⁴ RPA also proposes separating individual access agreements from broader corridor development strategies as a means for public entities to negotiate more favorable terms when seeking access to existing or new corridors. Further, RPA calls for creation of a rail enhancement fund supported by a dedicated revenue source to improve passenger rail networks on an ongoing basis.

Dispute resolution: RPA's response describes a rise in host railroad interference and passenger delays and it proposes three solutions: creation of a central dispatching authority, granting Amtrak a statutory private right of action to enforce dispatching *preference*, and legislation to shift creation of the *Passenger Rail Investment and Improvement Act of 2008* mandated performance metrics and standards to STB, which RPA states would streamline regulatory oversight.

San Joaquin Regional Rail Commission (Appendix H)

Access agreements: SJRRC describes its trackage rights agreement with its host railroads, Union Pacific Railroad and Caltrain. SJRRC has a ten-year agreement with Union Pacific, which it renegotiates at the end of every term. The agreement includes provisions related to per-train mile fees, a capital access fee paid annually on a per roundtrip basis, and capitalized maintenance paid annually on a per roundtrip basis. SJRRC notes that Union Pacific expects SJRRC to fund immediately the increased costs negotiated as part of a new agreement. SJRRC finds such timing difficult to achieve due to its member governments' lengthy budgeting processes. It also struggles to negotiate lower costs because Union Pacific can terminate access rights, if its terms are not met.

Dispute Resolution: SJRRC's agreement with Union Pacific stipulates that the American Arbitration Association's commercial arbitration rules are used to resolve disputes.

¹⁴ Ahmadreza Talebian and Bo Zou, "Integrated Modeling of High Performance Passenger and Freight Train Operation Planning on Shared Use Corridors: A Focus on the U.S. Context," *Transportation Research Part B: Methodological*, volume 82, pages 114 to 140, December 2015.

Chapter 3. Train Performance

Central to the issue of intercity passenger rail train performance in the United States is how Amtrak’s statutory *preference* is applied in practice. Due to Amtrak’s poor operating performance during its initial years of service, Congress included a provision in the *Amtrak Improvement Act of 1973* to provide Amtrak “preference over freight transportation in using a rail line, junction, or crossing unless the [Surface Transportation Board (STB)] orders otherwise ...”¹⁵ Amtrak states that host freight railroads make dispatching and other operational decisions that violate Amtrak’s *preference* right and negatively affect Amtrak performance. The Association of American Railroads (AAR) contends that the *preference* requirement is not absolute, and if so applied, would cause gridlock on many routes and harm the economy.¹⁶

Congress established a goal in 1981 that Amtrak shall operate its trains “to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables.”¹⁷ The *Passenger Rail Investment and Improvement Act of 2008* (PRIIA) directed FRA and Amtrak jointly to “develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.”¹⁸ The law called for development of metrics and standards related to cost recovery, on-time performance (OTP), minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. In May 2010, FRA issued the final metrics and standards.¹⁹ However, the statute authorizing development of metrics and standards is the subject of ongoing litigation.

PRIIA also authorized STB to investigate – either on its own initiative or after receiving a complaint from Amtrak, other intercity passenger railroads, or a host freight railroad – instances where for two consecutive calendar quarters (1) the OTP of any intercity passenger train averages less than 80 percent; or (2) the service quality of intercity passenger train operations fails to meet the [jointly developed FRA-Amtrak] metrics and standards. PRIIA authorized STB to award damages against a rail carrier when STB determines that delays or failures to achieve the minimum standards are attributable to a rail carrier’s failure to provide *preference* to Amtrak over freight transportation.²⁰

¹⁵ P.L. 93-146 and 49 U.S.C. 24308(c)

¹⁶ STB Docket Number EP 728 contains extensive filings regarding *preference* from Amtrak, AAR, and other parties.

¹⁷ 49 U.S.C. 24101(c)(4) originating in the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, §1172(2), 95 Stat. 357, 688 (1981).

¹⁸ PRIIA, section 207.

¹⁹ Federal Register, *Metrics and Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008*, volume 75, page 26839, May 12, 2010.

²⁰ PRIIA, section 213.

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STB issued a final rule defining and specifying a formula for calculating OTP for the purposes of implementing and conducting investigations of substandard intercity passenger rail performance.²¹ However, this rulemaking was the subject of litigation and was vacated on July 12, 2017, on the basis that STB had exceeded its authority in defining OTP under PRIIA.²²

The following paragraphs summarize the responses about this issue to Administrator Batory's letter. The full responses are in the appendices to this report.

Surface Transportation Board (Appendix C)

Train performance standards: STB's response summarizes relevant sections of PRIIA and states the status of the metrics and standards is uncertain due to litigation and the court decision that vacated them. STB states it is impossible to assess the strengths of the now-vacated metrics and standards because they were not applied in practice.

Amtrak (Appendix D)

Amtrak's response states that its statutory access rights and the operating agreements with host railroads have been generally effective in enabling Amtrak to carry out its statutory mandate to operate a nationwide intercity passenger rail network. However, two major shortcomings impede Amtrak's ability to provide reliable, cost-effective service:

- Lack of any means to enforce its right of *preference* over freight railroads; and
- Ability of host railroads to prevent service expansion by delaying planning efforts and making unreasonable demands for Amtrak capital investments to accommodate service increases.

Amtrak's operating agreements with hosts include penalties for poor OTP, but Amtrak has found these ineffective. Amtrak also notes some host railroads' unwillingness to accommodate detouring Amtrak trains when normal routes are unavailable.

Train performance standards: Amtrak's response summarizes relevant PRIIA sections and the litigation related to development of the joint FRA-Amtrak metrics and standards. Amtrak asserts that the primary train performance standard is its statutory right of *preference* over freight transportation.²³ Amtrak concludes that it needs an immediate and effective legal remedy for *preference* violations that delay its passengers. Amtrak recommends that the U.S. Department of Transportation and FRA support Amtrak's ability to bring a civil action to enforce *preference*.

²¹ OTP under PRIIA section 213, STB Final Rule, Docket No. EP 726 (July 28, 2016).

²² *Union Pacific R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816 (8th Cir. 2017).

²³ 49 U.S.C. 24308(c).

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Amtrak characterizes its OTP on most host railroads as poor. For example, all stations OTP for long distance trains in FY 2017 was 47 percent. Amtrak summarizes a 2008 report from the U.S. DOT Office of Inspector General that found host railroads' dispatching decisions deliberately delayed trains.²⁴ The report linked poor OTP with ridership declines and increased costs.

Amtrak also states that when mechanisms to enforce *preference* have existed, its OTP improved. It cites OTP improvements after enactment of the 1973 *preference* provision, a U.S. Department of Justice enforcement action in 1979, and enactment of PRIIA in 2008. Conversely, since the July 2017 court decision vacating STB's OTP rulemaking, delays from freight train interference have increased by 21 percent, according to Amtrak.

Amtrak states that it generally delivers high OTP for its tenants. Amtrak has performance incentives in place with several commuter agencies, although no federal statutes or regulations set OTP goals or require performance-based payments for commuter rail operations on Amtrak-owned corridors. Additionally, NEC Commission policy requires an annual review of performance, including OTP.

Recording delays: Amtrak's response describes its electronic delay reporting system, which the conductors use to record and assign responsibility (Amtrak, host, or third party) for each delay. In 2017, Amtrak's Office of Inspector General reviewed this delay reporting system and found it to be generally accurate.

Rail Passengers Association (Appendix G)

Train performance standards: RPA's response asserts that the mechanisms to address poor OTP (such as the statutory *preference* provision and PRIIA) are little used and generally ineffective due to lax enforcement and litigation. RPA argued in favor of the joint FRA-Amtrak OTP standards in federal court.

RPA's response also states that all-stations OTP is the correct standard for establishing and measuring train performance. Other measures, such as end-point OTP, ignore the experiences of the majority of Amtrak passengers who get on or off a train at an intermediate station. Further, any proposed regulations must use a single 15-minute standard at each station on a train's route and must trigger an investigation, if performance on a route falls below the standard more than 20 percent of the time.

Approaches to address weaknesses: RPA's response asserts that missed connections have significant safety, comfort, and financial impacts on passengers. Collected and published data should measure the effect of degraded OTP on connections. In addition, Amtrak should be required to report when late trains cause passengers to miss connections or when Amtrak

²⁴ U.S. DOT Office of Inspector General, *Root Causes of Amtrak Train Delays*, CR-2008-076, September 8, 2008.

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delays a train on behalf of connecting passengers. Available data should also include OTP at points where passenger trains are handed off from one host to another and track the impacts of very late trains. New metrics should track each delay in minutes and reflect how that delay disrupted connections.

San Joaquin Regional Rail Commission (Appendix H)

Train performance standards, penalties, and incentives: SJRRC writes that its Altamont Corridor Express (ACE) trains have operated near or over 90 percent OTP for 20 years. Addressing OTP problems is difficult, because SJRRC's agreement with Union Pacific includes no penalties or remedies for noncompliance other than arbitration. The agreement requires 95 percent OTP, which it defines as arriving at a final station within 5 minutes of its scheduled time. If Union Pacific dispatching errors lead to OTP below 95 percent for a calendar month, ACE will have absolute priority for a continuous month over Union Pacific double-stack trains, according to the agreement. No financial incentives are included.

Recording delays: ACE train crews record delays, forward them daily to the host railroad, and when the railroads disagree on the causes, the parties discuss the delays. The process makes the host railroad aware of the decisions its dispatchers are making and allows for the modification of dispatching protocols, as needed.

Weaknesses and approaches: SJRRC writes that the major weaknesses with its current approach to OTP are that there is no penalty when a host railroad does not follow the operating agreement and that arbitration takes a long time. Building a long-term partnership with its host has yielded strong performance, perhaps better than that achieved by systems that rely on statutory penalties. SJRRC proposes an approach in which all passenger rail services adopt the same incentive/penalty program as SJRRC's, funded from a single source.

Chapter 4. Measuring and Maintaining Public Benefits from Public Investment

From Amtrak's creation in 1970 until 2008, most federal investment in intercity passenger rail service was provided to Amtrak by annual appropriations from Congress, with occasional additional appropriations or Congressionally-directed spending. Federal investment in freight rail during the 1970s and 1980s was limited and focused primarily on helping states continue service during and after deregulation or improving specific safety issues.

This paradigm shifted over the last decade. In 2008, the *Passenger Rail Investment and Improvement Act of 2008* (PRIIA) created federal-state investment programs, followed by fiscal years 2008 to 2010 appropriations. In addition, the Better Utilizing Investments to Leverage Development (BUILD) program enabled states and local governments to invest in passenger and freight rail.²⁵ The *Fixing America's Surface Transportation Act* (FAST Act) broadened investment parameters further, enabling federal investment in rail projects to an expanded grant recipient pool, including states, local governments, freight railroads, Amtrak, and other intercity passenger railroads.

This diversification of and increase in investments spurred the U.S. Department of Transportation to implement procedures to ensure federal funding would lead to measurable and sustainable public benefits. The Department developed, and routinely updates, guidance on conducting benefit-cost analysis for its discretionary grant programs.²⁶ FRA's FAST Act capital investment grant programs²⁷ require applicants to follow the Department's guidance and FRA to use benefit-cost analysis in evaluating proposed projects.

To measure and maintain public benefits, FRA required project partners to execute service outcome agreements for the 2009 and 2010 federal grants for major investments in new or improved intercity passenger rail service. Each service outcome agreement was tailored to the parties and project conditions – typically a state department of transportation as grant recipient, Amtrak as service operator, and a freight railroad as host infrastructure owner. Amtrak, 12 state entities, and 9 host railroads reached 15 such agreements.

These service outcome agreements contain enforceable commitments from the project stakeholders to deliver quantified benefits, such as additional daily round trips, improved on-time performance (OTP), fewer minutes of delay, reduced scheduled trip times, or increased capacity.

²⁵ The Transportation Investment Generating Economic Recovery program (TIGER) became BUILD in 2017.

²⁶ U.S. Department of Transportation, *Benefit-Cost Analysis Guidance for Discretionary Grant Programs*, December 2018, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/transportation-policy/14091/benefit-cost-analysis-guidance-2018.pdf>.

²⁷ Consolidated Rail Infrastructure and Safety Improvements program (49 U.S.C. 24407) and the Federal-State Partnership for State of Good Repair program (49 U.S.C. 24911).

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The agreements typically cover a 20-year horizon beginning when a project improvement is placed into service. Moreover, the agreements include provisions on enforcement, dispute resolution, modification procedures, and high-level maintenance and operations commitments.

The following paragraphs summarize the responses about this issue to Administrator Batory's letter. The full responses are in the appendices to this report.

Surface Transportation Board (Appendix C)

STB's response describes its authority related to improvements on shared-use rights-of-way, though it states that STB does not have a mechanism for measuring and maintaining public benefits for publicly-funded rail projects. If STB determines that Amtrak delays are due to a host railroad's failure to provide Amtrak's statutory right of *preference*, STB has authority to award damages to Amtrak, which it must expend on improvements for underperforming routes.

Amtrak (Appendix D)

Service outcome agreements: Amtrak's response describes the purpose, content, and history of service outcome agreements. Amtrak notes 6 of the 15 outcome agreements are out of compliance due to host responsible delays above the agreement standards and some state partners have asked the host railroads for corrective action plans.

Amtrak's response states a strength of these agreements is they support good project selection and financial stewardship by codifying the expected public benefits of public investments and providing a mechanism for recourse when the benefits are not achieved. However, a weakness is that they can be difficult to negotiate; it might be better not to proceed with a project when an agreement cannot be reached with a host railroad.

Amtrak recommends continued use of service outcome agreements for improvements to assets not controlled by the project funder or the passenger rail service operator. Amtrak suggests that grant applications stipulate that host railroads deliver the service outcomes contained in the application with no post-award renegotiation of terms. Amtrak also recommends that both it and states be empowered to enforce service outcome agreements.

Rail Passengers Association (Appendix G)

Service outcome agreements: RPA's response describes the service outcome agreements FRA first used when it awarded intercity passenger rail grants in 2010. RPA describes the freight railroads' reluctance to enter into the agreements, which delayed the expenditure of grant funds. RPA specifically notes problems related to the agreement between New York State and CSX for passenger improvements along Amtrak's Empire Corridor.

Shared-Use of Railroad Rights-of-Way

Improvements: RPA recommends that public funders and owners of rail corridors collaboratively develop alternative mechanisms to measure and maintain public benefits. The mechanisms should recognize the host railroads' need to control their operations and the importance of better passenger rail service. The mechanisms should also account for more than passenger train performance and include the ridership, revenue, and economic impacts of better passenger rail transportation. RPA advocates for the use of an economic benefits model that considers not only direct benefits to freight and passenger rail operators, but also the additional economic activity, including increased tourism, land use impacts, and reduced transportation costs.

San Joaquin Regional Rail Commission (Appendix H)

SJRRC's response lists five possible measures of public benefits: OTP, service reliability, increased speed, reduced scheduled run times, and improved ride quality.

Chapter 5. Operations, Capacity, and Cost Estimation Modeling

Capital projects or operational improvements entail analysis both to identify the need for a proposed project and to refine the proposed project to its final design for implementation. This report chapter focuses on operations analysis, capacity modeling, and cost estimation. Other factors not addressed here also play a role in project development and implementation, such as travel demand forecasting, fleet analysis, station planning, workforce planning, and environmental analysis.

FRA uses the phrase *operations analysis* to refer to the process of modeling train movements through the network of physical infrastructure and identifying capital projects or service adjustments that will achieve service objectives. Operations analysis identifies what is feasible within the constraints of the physical infrastructure and recognizes locations that will cause delays, reduce reliability, or lead to other adverse impacts. Operations analysis helps determine the number of trains a specified corridor or piece of infrastructure can accommodate, also referred to as *capacity*.²⁸ Tools exist in the industry to conduct operations analysis, including commercially available software and proprietary models developed by railroads. These tools range from simple spreadsheets to mathematically derived parametric capacity models to complex computer simulations, and these tools are often used with one another.

Cost estimation—the process of determining the cost to construct, operate, and maintain a project—is critical in helping determine a project’s financial feasibility. Cost estimation can also influence which solutions are considered. If a project sponsor deems excessive a proposed project’s capital or operating cost, the sponsor can consider alternatives or design revisions. FRA has developed guidance and standard cost categories to assist sponsors in developing cost estimates for FRA-funded projects.²⁹

Rail operators utilizing infrastructure owned by another party in shared-use corridors require the affected stakeholders to collaborate to identify the projects needed to implement the proposed objectives. In some cases, host railroads might not share all inputs and assumptions used in their modeling, citing proprietary or business confidentiality concerns. In other cases, host railroads might require improvements be built to protect the host railroads’ future capacity needs. This can result in contentious negotiations among host railroads, operators, and project sponsors to determine the final project alternatives and costs.

²⁸ *Physical capacity* is the maximum number of trains that can run along the corridor measured by the physical constraints of the design and condition of the rail and trainset proposed for the service, without regard to other activity on the corridor. *Practical capacity* considers the number of trains that can be accommodated with an acceptable transit or travel time within the context of all other services on the corridor.

²⁹ FRA, *Capital Cost Estimating*, August 2016, <https://www.fra.dot.gov/Elib/Document/16647>.

Shared-Use of Railroad Rights-of-Way

The following paragraphs summarize the responses about this issue to Administrator Batory's letter. The full responses are in the appendices to this report.

Surface Transportation Board (Appendix C)

Possible approaches: STB's response describes its use of the Rail Traffic Controller software in freight rail rate cases. Using information from real-world train movements, the software models traffic over a proposed network, develops operating statistics, and determines whether capacity exists on the proposed alternative network. STB uses Rail Traffic Controller for freight modeling only, but STB understands Amtrak and freight railroads use this software product in intercity passenger rail capacity analyses. STB suggests combining the software with Amtrak's and host railroads' real-world train movement data to assist FRA decision-making about shared-use corridors.

Amtrak (Appendix D)

Amtrak's response on approaches to modeling pertains to publicly-funded investments that support Amtrak services on freight railroad-owned infrastructure. Some of its comments do not apply to the NEC, because the NEC Commission provides a forum and process for stakeholders to participate in modeling and determining investment needs.

Modeling: Operations and capacity modeling are critically important to the expansion of passenger rail service. However, modeling is not a prerequisite, because Amtrak refers to its statutory right to operate additional trains on host railroad lines, unless such operations would "impair unreasonably" freight transportation.³⁰ Amtrak notes that modeling based on unreasonable assumptions can overstate the investments needed to increase passenger service, which in turn, can waste taxpayer money or hinder expansion.

Possible approaches: Amtrak advocates modeling that is transparent, unbiased, not reliant on speculative freight traffic projections, and consistent with Amtrak's statutory access rights. Modeling should follow three principles: (1) no operations or capacity model provides a "right" answer; (2) all parties must participate equally in the modeling process, with access to the model, data inputs, results, scenarios, and assumptions; and (3) modeling should recognize Amtrak's statutory rights to *incremental cost* access and operation of additional trains. Recent modeling exercises that did not follow these principles led to issues, including (a) allowing a host railroad to conduct the modeling and share its answer with other parties; (b) modeling for "zero impact" rather than "unreasonable impairment" of freight operations; and (c) basing modeling on theoretical future freight traffic volumes.

Amtrak recommends three approaches to ensure unbiased and transparent modeling: (1) all participants jointly hire an independent third-party; (2) parties develop consensus model

³⁰ 49 U.S.C 24308(e).

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assumptions, subjective judgements, and objectives; and (3) if consensus cannot be reached, an unbiased third party makes decisions about model assumptions or the model is run separately with each party's assumptions. Amtrak does not see an urgent need for government or industry to develop new modeling resources.

Rail Passengers Association (Appendix G)

Modeling: RPA's response characterizes the process for estimating operations, capacity, and costs as one in which proprietary interests hinder transparency. RPA refers to FRA's \$117 million estimate for the capital improvements needed to restore passenger rail service along the Gulf of Mexico. By contrast, the host railroad—without sharing its assumptions, method, or data—reported that the restoration would require \$2.3 billion in improvements. RPA finds the disparity and lack of transparency unsurprising and notes that pressure from shareholders and taxation of railroad rights-of-way discourages capital investment by freight railroads.

Possible approaches: A systematic, transparent data collection regime would lead to better regulatory approaches, more reliable benefits and costs information for rail investment, and ultimately, more public investment in the national rail system. RPA recommends that the U.S. Department of Transportation look to the Federal Aviation Administration's tools as examples for gathering information on the financial health of operators, travel demand, and metrics such as delays and cancellations.³¹ Collection and analysis of similar data for the rail industry would help set data-driven targets and financial incentives, such as bonus payments, for host railroads that deliver strong on-time performance, reduced trip times, and greater frequencies. Such payments would be an incentive for private investment that benefits both freight and passenger rail services. Such data would also help set standards for Amtrak-responsible delays, particularly due to equipment failures. RPA states Congressional pressure on Amtrak to reduce operating costs has created incentives for the railroad to defer maintenance.

San Joaquin Regional Rail Commission (Appendix H)

SJRRC describes its operations monitoring center, which contains displays of host railroad train movements that allow Altamont Corridor Express (ACE) staff to monitor and engage the host railroad on dispatching issues, delay prevention, and network issues that affect ACE operations. Transparent modeling of rail capacity is difficult, given the confidential nature of host railroad freight movements, aggressiveness of the freight railroad's growth projections, and fluidity of freight rail operations. SJRRC proposes non-disclosure agreements as an avenue to improve understanding of freight movements over a corridor.

³¹ Form 41 for financial filings and T100 for market data filings.

Chapter 6. Liability Requirements and Arrangements

Determining liability in the event of an accident is another complexity of freight and passenger rail operations in shared-use corridors. The *Amtrak Reform and Accountability Act of 1997* (ARAA)³² included provisions intended to address rail liability issues, reflecting freight railroads' concerns about sharing their rights-of-way with passenger trains, difficulties passenger and freight railroads had negotiating operating agreements, and a 1988 U.S. District Court ruling concerning indemnification provisions between Amtrak and Conrail.³³

ARAA established a limit on aggregate allowable awards to all rail passengers against all defendants for all claims related to a single accident or incident arising from or in connection with provision of rail passenger transportation.³⁴ The limit does not apply to freight rail incidents. ARAA set the limit at \$200 million until the 2015 *Fixing America's Surface Transportation Act* (FAST Act) raised the cap to \$294 million, linking it retroactively to inflation and requiring adjustment every five years.³⁵ ARAA also requires Amtrak to maintain liability coverage of at least \$200 million per accident or incident.

The following paragraphs summarize the responses about this issue to Administrator Batory's letter. The full responses are in the appendices to this report.

Surface Transportation Board (Appendix C)

Liability arrangements: STB's response states liability and insurance issues are generally not within its jurisdiction, but notes that it reported to Congress in 2010 on liability issues related to agreements between passenger and freight rail entities.³⁶ In the report, STB described an instance in which it declined to interpret an STB-imposed provision in a way that would excuse a rail carrier from liability resulting from its gross negligence or willful misconduct.

Amtrak (Appendix D)

Liability arrangements: Amtrak's response describes its liability arrangements:

- Freight railroads: Amtrak's operating agreements with most freight railroads are not based on fault and provide an "each takes its own" liability arrangement. Each railroad

³² P.L. 105-134.

³³ U.S. Government Accountability Office, *Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations*, GAO-09-282, February 2009.

³⁴ 49 U.S.C. 28103.

³⁵ The Consumer Price Index – All Urban Consumers is the specified inflation measure for adjusting the limit on aggregate awards per incident.

³⁶ Surface Transportation Board, letter report to the U.S. House of Representatives Committee on Appropriations, June 10, 2010, <https://www.stb.gov/stb/docs/liability%20Report%20letter%2006-10.pdf>.

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assumes responsibility for its employees and property and Amtrak assumes responsibility for its passengers. The arrangement produces efficiencies, certainty, and public interest benefits.

- State governments that pay Amtrak to operate intercity passenger rail service: Amtrak generally indemnifies the states for liability or damage arising from operation of state-supported services. Amtrak pools this risk with its long distance and Northeast Corridor (NEC) operational risks and insures them through its liability and insurance programs. States pay Amtrak for their part of the insurance expenses through the state-supported services cost sharing formula. Some states have insurance arrangements that limit retained liability for damage to Amtrak-owned and state-owned rolling stock in state-supported service.
- Commuter agencies on the NEC: Amtrak's agreements with commuter agencies use a *but for* arrangement, under which the commuter agency indemnifies Amtrak for death, personal injury, and property loss and damage to the commuter's and Amtrak's employees and passengers that would not have occurred in the absence of the commuter operation. The same is true for damage to commuter agency and Amtrak property and infrastructure.

Statutory liability limits: According to Amtrak, the statutory cap³⁷ allows Amtrak to manage its liability costs and provide fair compensation to passengers. The cap also leads to faster settlements and sets monetary expectations for all parties. Amtrak does not advocate changing the cap beyond the five-year statutory adjustments for inflation. The FAST Act change resulted in higher insurance costs and fewer insurers willing to write excess coverage. Amtrak recommends the liability cap apply not only to passenger claims, but also to third-party claims made by motorists, pedestrians, and others. This arrangement would be fairer to passengers, limit the railroad's liability to third parties, and reduce the cost of insurance.

Amtrak insurance requirements: Amtrak has more insurance coverage than its ARAA-required \$200 million minimum. However, Amtrak is the only passenger rail provider subject to such a requirement. Other passenger rail providers, some of whom are subsidiaries of foreign corporations, can operate without any insurance coverage. These providers might lack financial resources to compensate claimants after a major incident. Amtrak recommends establishment of a minimum insurance requirement for entities engaged in passenger rail service. The requirement should at least match the \$294 million single incident aggregate awards cap, increase with inflation, and protect all passengers, employees, and third parties.

³⁷ 49 U.S.C. 28103.

Shared-Use of Railroad Rights-of-Way

Insurance alternatives: Congress should study the potential for a private insurance pool or government sponsored or managed insurance program, such as the *Price-Anderson Nuclear Industries Indemnity Act* program for nuclear power plants³⁸ or the federal insurance backstop to compensate victims of terrorism. A private insurance pool would allow Amtrak, commuter agencies, states, and possibly freight railroads to secure excess insurance jointly, and, if needed, the federal government could cover losses beyond commercially available excess coverage.

Benefits of these alternatives include geographic diversification of the underwriting portfolio, less variability of losses due to the wider spread of risks, stabilization of cash flow, longer-term view of risks, and broader coverage than might be available commercially.

Disadvantages of the alternate models include members sharing the losses but not the loss control or claims management of other members, governmental entities might have sovereign immunity that lessens their participation, anti-deficiency laws inhibit the ability to share in unplanned loss assessments, variability of safety and risk profiles for participants, gaining support from commercial insurers, and risk of financial hardship due to claims.

NEC Commission: Amtrak describes the NEC Commission's current liability issues study, which is looking at, among other things, establishment of a captive insurance company to cover operators on the NEC. Such a mechanism is worth considering, but Amtrak disagrees with any fault-based carve-outs for major accidents, which would increase transaction costs, delay resolution, and increase premiums.

Association of American Railroads (Appendix E)

Liability arrangements: According to AAR's response, host railroads must continue to be protected from liability that would not have resulted *but for* the added presence of passenger rail service. For freight railroads to take on any liability that arises from passenger rail service would be a subsidy of passenger rail.

American Short Line and Regional Railroad Association (Appendix F)

Liability arrangements and statutory limits: ASLRRRA describes additional risks that result from passenger operations in shared-use corridors, such as higher speeds and additional bystanders. Insurance limits for a host freight railroad increase in such corridors. If the government encourages shared-use rail corridors, it must also provide tort reform conducive to this arrangement. At a minimum, statutory limits should be set as they are now with Amtrak, must apply regardless of sovereign immunity laws, and cap all claims involving passenger service against a freight carrier. Any new or amended statutory limit must always be in place without reductions by aggregate terms per incident, numerous additional insureds,

³⁸ P.L. 85-256.

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or as new incidents occur. No federal statute limits claims by light rail and commuter passenger rail as it does for Amtrak, according to ASLRRRA.³⁹ Either federal or state statute could address the disparity.

Obtaining sufficient insurance might be impossible, so ASLRRRA agreements with passenger operators include terms that indemnify the host for any damages or injuries for which the host is liable and are not offset by insurance payouts. In some states, a public entity's legal authority to indemnify is uncertain and a statutory authorization might suffice to address the issue.

Variations in state court interpretations of "additional insureds" are an ASLRRRA concern and it cites the case of Burlington Ins. Co. v. New York Transit Authority. Even if a passenger rail operator adds a host railroad as an additional insured, the host might not have coverage when an incident is caused by the additional insured's operations.

Rail Passengers Association (Appendix G)

Liability cap: According to RPA, the FAST Act aggregate awards cap does not need to be increased. Instead, a federal study should analyze the appropriateness of reducing the cap because implementation of positive train control will yield safety benefits.

Alternative models: Possible models include a captive insurance pool overseen by the federal government; an approach in which the government acts as a direct insurer offering subsidized premiums like the National Flood Insurance program; and an arrangement such as the Terrorism Risk Insurance program, in which statute lowers the liability cap to a market-friendly level and provides a federal backstop to insurers. RPA also recommends analyzing the approaches of private passenger railroads, such as [Virgin Trains USA]⁴⁰ and Texas Central Partners, to liability compliance.

San Joaquin Regional Rail Commission (Appendix H)

Statutory limits and alternative models: According to SJRRC, the federal statutory liability limit is beneficial, because it limits payouts. However, the limit gives the perception that railroads can pay more for less significant incidents. The limit has increased insurance costs for passenger operators, because host railroads require them to match the statutory levels. Pooled insurance could spread costs over a larger number of entities and should be evaluated.

³⁹ The statutory cap on awards applies to claims "against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State," among others (49 U.S.C. 28103(e)(1)(A)).

⁴⁰ Formerly known as Brightline and All Aboard Florida.

Chapter 7. Sovereign Immunity

Closely tied to the issue of liability, state sovereign immunity can introduce uncertainty and contention in shared-use corridors. Sovereign immunity laws differ from state to state. The *Amtrak Reform and Accountability Act of 1997* (ARAA) allows passenger rail operators to enter into contracts that allocate financial responsibility for claims.⁴¹ Host railroads typically require rail operators to indemnify the host railroad as a condition of utilizing their rights-of-way (regardless of whether the host is a freight railroad, a commuter railroad, or Amtrak). There is some dispute as to whether federal law preempts state prohibitions on indemnification for commuter railroads that are owned and operated by states.

The following paragraphs summarize the responses about this issue to Administrator Batory's letter. The full responses are in the appendices to this report.

Surface Transportation Board (Appendix C)

Sovereign immunity: STB's response refers to its 2010 report to Congress on rail liability and writes that issues of sovereign immunity generally do not arise in its proceedings.⁴² However, STB notes two examples in which it addressed the issue. In 2010, STB opposed a proposed asset sale in part because the purchaser (Florida Department of Transportation) asserted sovereign immunity and refused to enter into an indemnity agreement with Amtrak, allegedly imperiling the Amtrak service the seller (CSX) was obliged to support on the line. Ultimately, STB did not address the question because Amtrak voluntarily withdrew its opposition before STB issued a decision.

STB has also addressed sovereign immunity in proceedings under the *National Trail Systems Act*.⁴³ This law requires a trail sponsor to assume full responsibility for any legal liability arising from the conversion of a railroad right-of-way into a trail. If a prospective sponsor has some immunity from liability, regulations permit the entity to serve as a trail sponsor only if it agrees to indemnify the railroad against any potential liability.

Amtrak (Appendix D)

Sovereign immunity effects: Amtrak's response states that sovereign immunity shifts costs to non-immune parties (e.g., Amtrak). As a result, Amtrak must protect against these exposures by purchasing greater coverage. It should not have to subsidize states that claim sovereign immunity.

⁴¹ 49 U.S.C. 28103(b).

⁴² Surface Transportation Board, letter report to the U.S. House of Representatives Committee on Appropriations, June 10, 2010, <https://www.stb.gov/stb/docs/liability%20Report%20letter%2006-10.pdf>.

⁴³ P.L. 90-543.

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Some states have asserted they cannot enter into agreements that allocate liability among rail users and Amtrak cannot enforce existing liability apportionment agreements. Amtrak describes situations in states with “joint and several liability” rules, which allow a plaintiff to collect full damages from a single defendant, even when multiple parties are at fault. A commuter agency that claims sovereign immunity after an incident exposes Amtrak to the full liability.

Amtrak states that any state receiving federal funds for rail operations or operating trains over rail lines with large federal infrastructure investments should be required to waive its immunity. Commuter railroads have had to do so to secure the right to operate over privately-owned rail lines.

American Short Line and Regional Railroad Association (Appendix F)

Sovereign immunity: ASLRRA’s response states any federal legislation on shared-use corridors should address sovereign immunity and ensure state sovereign immunity laws cannot place the risks of passenger service on the freight carrier. Two possible approaches are legislation that preempts certain state laws or state laws that mandate insurance coverage limits, cap liability, and assure that contract terms take precedence over sovereign immunity statutes or case law.

Rail Passengers Association (Appendix G)

Sovereign immunity: RPA’s response states that state sovereign immunity and liability are separate issues for state-sponsored passenger rail services. FRA entangled the two issues by making the state the principal entity of record responsible for compliance with federal railroad safety regulations. FRA’s position provides states a disincentive to increase state-supported passenger rail service. Suitable contractors and subcontractors should be able to act as the principal entity of record to ensure liability compliance, according to RPA.

San Joaquin Regional Rail Commission (Appendix H)

SJRRC writes that sovereign immunity is a state issue and does not apply to Altamont Corridor Express service.

Chapter 8. Summary of Stakeholders' Recommendations for Consideration

This chapter summarizes the respondents' recommendations and options for Congress and stakeholders to consider that would improve operations on shared-use corridors. The full responses are in the appendices to this report. As stated in the introduction, **presentation herein of the responses does not imply FRA agrees or disagrees with the respondents' points of view, assertions, positions, or recommendations, and FRA has not determined if these suggestions would require statutory, regulatory or contractual action**

Access to Railroad Rights-of-Way

Association of American Railroads (AAR)

- Passenger operations on freight-owned infrastructure must be based on negotiated agreements that address site specific safety, operational, compensation, and legal issues. These agreements must ensure host freight railroads are fully compensated for all costs and protected from liability risks associated with hosting the service. Current and future infrastructure use for freight operations cannot be impaired.

American Short Line and Regional Railroad Association (ASLRRA)

- Access agreements should be based on three primary conditions: (1) freight rail takes priority; (2) the passenger rail operator assumes liability for all *but for* costs borne against the freight railroad, regardless of negligence or fault; and (3) the passenger operator provides insurance that includes the host freight railroad as a “named insured.”

Rail Passengers Association (RPA)

- Establish a federal grant program to purchase abandoned and underutilized corridors from freight railroads.
- Establish a railroad enhancement fund with a dedicated revenue source to improve passenger rail networks.
- Separate access agreements from strategies related to intercity passenger rail corridor development.
- Create a central dispatching authority.

Train Performance Standards

Amtrak

- Provide Amtrak with a private right of action to enforce its statutory *preference*.

RPA

- Provide Amtrak with a private right of action to enforce its statutory *preference*.

Shared-Use of Railroad Rights-of-Way

- Utilize existing authorities and mechanisms such as STB’s authority to award damages to address poor on-time performance (OTP). Shift the creation of OTP metrics and standards to STB; use all-stations OTP as the standard for establishing and measuring train performance.
- Require Amtrak to provide greater granularity on the effects of poor OTP, including when late trains cause passengers to miss connections or when Amtrak delays trains on behalf of connecting passengers.
- New metrics on train performance should track how delays disrupt passenger connections.

San Joaquin Regional Rail Commission (SJRRC)

- Require all passenger rail services to adopt the same incentive and penalty program, to be paid from a single funding source.

Measuring and Maintaining Public Benefits

Amtrak

- Continue to use service outcome agreements for public investments intended to benefit passenger rail where neither the funder nor the passenger rail operator controls the improved assets.

RPA

- Collaboratively develop revised and alternative mechanisms to service outcome agreements among the infrastructure funders and owners.
- When measuring public benefits, develop and utilize a model that considers not only direct benefits to freight and passenger rail operators, but also additional economic activity that results from rail investments (e.g., tourism, land use, and real estate).

Operations, Capacity, and Cost Estimation Modeling

Surface Transportation Board (STB)

- Utilize real-world train movement data from Amtrak and host freight railroads, in combination with modeling software, to inform decisions on shared-use operations.

Amtrak

- Modeling to support publicly-funded investments in intercity passenger rail should follow three principles: (1) no operations or capacity model provides a “right answer;” (2) all parties must participate equally in the modeling process, including access to the model, input data, results, scenarios, and assumptions; and (3) modeling should recognize Amtrak’s statutory rights to *incremental cost* access and operation of additional trains.

Shared-Use of Railroad Rights-of-Way

- Rail stakeholders should ensure unbiased and transparent modeling by following these approaches: (a) all participants jointly hire an independent third-party modeler; (b) participants seek consensus on model assumptions, subjective judgements, and objectives; and (c) if consensus cannot be reached, an unbiased third party makes decisions about model assumptions or the model is run separately with each party's assumptions.

RPA

- Collect more comprehensive railroad operating data and statistics, akin to the Form 41 financial filings and T100 market data filings utilized by FAA, to develop new data-driven metrics, targets, and financial incentives to improve rail operations and investments.

Liability

Amtrak

- Establish and apply statutory limits to third-party claims, such as motorists and pedestrians, in addition to the passenger claims currently covered by liability caps.
- Do not change the existing liability cap beyond allowing for the automatic inflation adjustments every five years. Do not retroactively increase the cap in the future.
- Set minimum liability insurance requirements for entities engaged in passenger rail service.
- Study the potential for a private insurance pool or government-backed insurance program.

AAR

- Fully protect host freight railroads from all liability that would not have resulted *but for* the presence of passenger rail.

ASLRRA

- Evaluate whether shared-use presents a safety risk for rail operations or the public.
- Apply liability limits regardless of state sovereign immunity laws and cap all claims involving passenger service or passenger rail service in conjunction with claims against a freight carrier.
- Assure full liability coverage for freight rail hosts and operators on a passenger rail operator's insurance policy in the same capacity as a named insured.

Shared-Use of Railroad Rights-of-Way

RPA

- Evaluate whether the existing liability limits warrant a reduction following the implementation of positive train control and the increased levels of safety anticipated.
- Increase the federal role in providing and supporting insurance coverage for rail operators, including potentially managing insurance programs, subsidizing premiums, lowering liability levels, and providing a federal backstop to insurers.
- Analyze liability compliance approaches utilized by private passenger railroads other than Amtrak.

SJRRC

- Evaluate the merit of pooling insurance to spread the costs of insurance among a larger number of entities.

Sovereign Immunity

Amtrak

- Require states that receive federal funding for rail operations or operate over rail lines that have received large federal investments to waive their right to sovereign immunity as it pertains to Amtrak operations.

ASLRRA

- Develop federal legislation to ensure that state sovereign immunity laws do not shift the risks of passenger service to the host freight carrier.

Appendix A. Federal Laws Referenced in this Report

This list includes laws referenced in the report and is not a compilation of all railroad laws.

Law	Public Law Number, Date of Enactment
Interstate Commerce Act of 1887	P.L. 49-104, February 4, 1887
Rail Passenger Service Act of 1970 (RPSA)	P.L. 91-518, October 30, 1970
Price-Anderson Nuclear Industries Indemnity Act	P.L. 85-256, September 2, 1957
National Trail Systems Act	P.L. 90-543, October 2, 1968
Amtrak Improvement Act of 1973	P.L. 93-146, November 3, 1973
Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act)	P.L. 94-210, February 5, 1976
Staggers Act of 1980	P.L. 96-448, October 14, 1980
Omnibus Budget Reconciliation Act of 1981	P.L. 97-35, August 13, 1981
Amtrak Reform and Accountability Act of 1997 (ARAA)	P.L. 105-134, December 2, 1997
Rail Safety Improvement Act of 2008 (RSIA)	P.L. 110-432, Division A, October 16, 2008
Passenger Rail Investment and Improvement Act of 2008 (PRIIA)	P.L. 110-432, Division B, October 16, 2008
Fixing America's Surface Transportation Act of 2015 (FAST Act)	P.L. 114-94, December 5, 2015

Appendix B. Example of Administrator Batory's Request for Input Letter⁴⁴



U.S. Department
of Transportation

**Federal Railroad
Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

JUL 25 2018

Dear Chairman Begeman:

I am writing to seek your input for a study on shared-use rail corridors required by the Fixing America's Surface Transportation Act (FAST Act).

Section 11311 of the FAST Act requires the U.S. Department of Transportation to complete a study that evaluates the shared-use of right-of-way by passenger and freight rail systems, including the operational, institutional, and legal structures that best support improvements to the U.S. rail network. Areas of study include access and use of host railroad right-of-way, train performance standards, measuring public benefits, modeling, liability, and other issues. Many of these study areas are subject to or the result of over 40 years of statutory requirements, Federal regulations, and business negotiations among the affected parties. Reassessing these parameters – many of which have been in place for decades – can help ensure the rail system is well-positioned to meet the passenger and freight mobility demands of our growing population.

As such, we are seeking your input on the following issues, as outlined in the FAST Act:

- (1) access and use of railroad right-of-way by a rail carrier that does not own the right-of-way, including access agreements, access costs, and dispute resolution;
- (2) effectiveness of existing contractual, statutory, and regulatory mechanisms for establishing, measuring, and enforcing train performance standards, including how delays are recorded and assigned, and the use of incentives/penalties;
- (3) strengths and weaknesses of the existing mechanisms under (2) and possible approaches to address the weaknesses;

⁴⁴ Identical letters sent to Northeast Corridor Commission, State-Amtrak Intercity Passenger Rail Committee, Amtrak, and stakeholder associations.

Shared-Use of Railroad Rights-of-Way

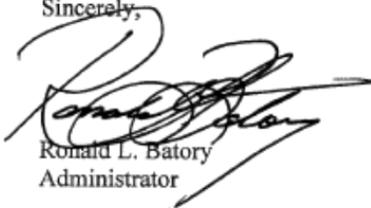
The Honorable Ann D. Begeman

Page 2

- (4) mechanisms for measuring and maintaining public benefits resulting from publicly funded freight or passenger rail improvements, including improvements directed towards shared-use right-of-way by passenger and freight rail;
- (5) approaches to operations, capacity, and cost estimation modeling that allow for transparent decision making and protect the proprietary interests of all parties;
- (6) liability requirements and arrangements, including whether: to expand statutory liability limits to other parties; to revise current statutory liability limits; to establish alternative insurance models (including models administered by the Federal Government); and current insurance levels of passenger rail operators are adequate and whether to establish minimum insurance requirements for such passenger operators; and
- (7) effect on rail passenger services, operations, liability limits, and insurance levels of the assertion of sovereign immunity by a State.

Your responses will help inform the development of the study and may be published as part of the study's report to Congress. Kindly send your responses back to Frances Bourne at the Federal Railroad Administration at frances.bourne@dot.gov by September 22, 2018.

Sincerely,



Ronald L. Batory
Administrator

Appendix C. Surface Transportation Board Response to the Federal Railroad Administration Request for Input



Office of Public Assistance, Governmental Affairs,
and Compliance

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

September 22, 2018

Ms. Frances Bourne
Federal Railroad Administration
U.S. Department of Transportation
1200 New Jersey Ave., S.W.
Washington, DC 20590

Dear Ms. Bourne:

This letter is in response to Administrator Batory's letter to Chairman Begeman seeking input for a study on shared-use rail corridors, as required by Section 11313(a) of the Fixing America's Surface Transportation Act (FAST Act). Specifically, Administrator Batory is seeking information on seven study areas outlined in the FAST Act. Each study area is addressed below.

(1) Access and use of railroad right-of-way by a rail carrier that does not own the right-of-way, including access agreements, access costs, and dispute resolution.

The Board has important but limited regulatory authority involving the National Railroad Passenger Corporation (Amtrak). Under 49 U.S.C. § 24308(a), Amtrak may establish agreements with rail carriers or regional transportation authorities to use those carriers' or authorities' facilities. The Board has authority to ensure that Amtrak may operate over other railroads' track¹ and to enforce Amtrak's statutory right of preference over freight transportation.² If Amtrak and the railroads or regional transportation entities fail to reach voluntary agreements, the Board may prescribe reasonable terms and compensation concerning shared use of tracks and other facilities.³ In addition, the Board may resolve disagreements between Amtrak and state entities concerning the allocation

¹ See 49 U.S.C. § 24308(a)(2)(A).

² See 49 U.S.C. § 24308(c), (f).

³ See 49 U.S.C. § 24308(a)(2). For example, in *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian National Railway*, Docket No. FD 35743, which is currently pending before the Board, Amtrak has asked the Board to establish terms and conditions governing Amtrak's use of CN rail lines and facilities.

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of costs for state-supported intercity passenger rail services⁴ and for Northeast Corridor operations, maintenance, and capital needs.⁵

The Board also has limited regulatory authority over certain non-Amtrak operators of passenger rail services. The Board has jurisdiction over passenger transportation when (1) the operator is classified as “a rail carrier” under the statute⁶ and (2) the transportation occurs across state lines as part of the interstate rail network.⁷ The Board reviews certain passenger rail projects to determine whether they constitute “part of the interstate rail network” or otherwise fall within the Board’s jurisdiction.⁸

Moreover, the Board addresses a handful of other matters involving the use of railroad right-of-way by a rail carrier that does not own the right-of-way. In many of its “*State of Maine*” cases, the Board assesses certain voluntary sales of rail assets (including rights-of-way) by freight carriers to public entities seeking to facilitate or improve commuter rail operations on the lines.⁹ The Board also reviews transactions involving

⁴ See 49 U.S.C. § 24101 note (Section 209 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA)); 49 U.S.C. § 24712(c). In *Amtrak’s Petition for Determination of PRIIA Section 209 Cost Methodology*, FD 35571 (STB served Mar. 15, 2012), the Board approved a methodology developed by Amtrak and relevant states for allocating operational and capital costs for certain state-subsidized intercity passenger rail services. After facilitation by the Federal Mediation and Conciliation Service, in June 2015, the parties reached agreement on the creation of a committee structure—including Amtrak, the Federal Railroad Administration (FRA), and the affected states—to negotiate and resolve ongoing cost allocation issues.

⁵ See 49 U.S.C. § 24905(c)(1)-(2); see also *Petition of the Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, FD 36048, slip op. at 1-2 (STB served Oct. 3, 2016) (discussing petition by Amtrak to determine appropriate compensation amounts between Amtrak and the Massachusetts Bay Transportation Authority along a portion of the Northeast Corridor, a dispute ultimately resolved amicably by the parties).

⁶ See 49 U.S.C. § 10501(a)(1)(A). The statute, 49 U.S.C. § 10102(5), defines “rail carrier” as “a person providing common carrier railroad transportation for compensation,” but clarifies that this “does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation[.]”

⁷ 49 U.S.C. §§ 10501(a)(2)(A), 10501(c)(2)(A).

⁸ See, e.g., *All Aboard Florida—Operations, LLC & All Aboard Florida—Stations—Construction & Operation Exemption—In Miami, Fla. & Orlando, Fla.*, FD 35680 (STB served Dec. 21, 2012); *DesertXpress Enterprises, LLC—Petition for Declaratory Order*, FD 34914 (STB served June 27, 2007 & May 7, 2010); *Am. Orient Express Ry.—Petition for Declaratory Order*, FD 34502 (STB served Dec. 29, 2005), *aff’d sub nom. Am. Orient Express Ry. v. STB*, 484 F.3d 554 (D.C. Cir. 2007).

⁹ Under *Maine, Department of Transportation—Acquisition and Operation Exemption—Maine Central Railroad*, 8 I.C.C. 2d 835 (1991) (*State of Maine*) and related precedent, the sale of the physical assets of a rail line by a carrier to another entity does not constitute the sale of a rail line within the meaning of 49 U.S.C. § 10901 (and, thus, does not require Board approval) “when the selling carrier retains: (1) a permanent, exclusive freight rail operating easement giving it the right and common carrier obligation to provide freight rail service on the line; and (2) sufficient control over the line to carry out common carrier operations.” *Wis. Dep’t of Transp.—Petition for Declaratory Order—Gibson Line in Milwaukee, Wis.*, FD 35401, slip op. at 3 (STB served Aug. 13, 2012); see also *Mass. Dep’t of Transportation—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, FD 35892, slip op. at 3-4 (STB served Mar. 19, 2015).

trackage rights arrangements, which allow one carrier to access and use the rail line(s) of another carrier.¹⁰ And under 49 U.S.C. § 11102, the Board may, under limited circumstances, grant a rail carrier trackage rights to use the terminal facilities of another rail carrier and prescribe conditions and compensation for such use.

Although the Board has some jurisdiction over different types of passenger rail, the Board does not have direct experience or broad data on the issue of right-of-way access that the FRA is seeking.

(2) Effectiveness of existing contractual, statutory, and regulatory mechanisms for establishing, measuring, and enforcing train performance standards, including how delays are recorded and assigned, and the use of incentives/penalties.

Rail carriers have long incorporated mechanisms for measuring and enforcing train performance standards (including incentives/penalties) into their private contracts with passenger rail carriers operating over their lines. In 2008, Congress enacted PRIIA, which expanded the Board's jurisdiction over passenger rail and set forth statutory and regulatory procedures for establishing and enforcing system-wide passenger train performance standards. As you know, Section 207 of PRIIA directed the FRA and Amtrak to jointly develop new (or improve existing) metrics and standards for measuring the performance and service quality of intercity passenger train operations, while Section 213 gave the STB certain enforcement or investigatory authority for services that perform poorly under the metrics and standards. But because the FRA/Amtrak metrics and standards are not in effect due to litigation over the constitutionality of Section 207,¹¹ and because the Board's decision seeking to fill the gap and adopt its own on-time performance standards under Section 213 was set aside by the U.S. Court of Appeals for the Eighth Circuit,¹² the status of metrics and standards, including enforcement, remains uncertain.

¹⁰ See 49 U.S.C. § 11323(a)(6). The Board may, in the context of a consolidation, merger, or acquisition-of-control transaction, impose trackage rights to alleviate potential anticompetitive effects. See § 11324(c).

¹¹ See *Ass'n of Am. Railroads v. Dep't of Transp.*, No. CV 11-1499, 2017 WL 6209642, at *3 (D.D.C. Mar. 23, 2017), *rev'd and remanded sub nom. Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, No. 17-5123, 2018 WL 3490075 (D.C. Cir. July 20, 2018); *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19 (D.C. Cir. 2016); *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *vacated and remanded sub nom. Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225 (2015).

¹² See *Union Pacific R.R. v. STB*, 863 F.3d 816 (8th Cir. 2017).

(3) Strengths and weaknesses of the existing mechanism under (2) and possible approaches to address the weaknesses.

As noted in response to (2) above, the FRA/Amtrak metrics and standards remain vacated and have yet to be applied in practice. Thus, it is not possible to assess the strengths of the existing mechanism, *e.g.*, whether it has produced standards that are clear, quantifiable, and easy to apply. The existing mechanism's principal weakness is the lingering uncertainty about its constitutionality, as reflected in years-long litigation. Although the Board itself attempted to address the potential constitutional deficiency by adopting its own on-time performance standards (to be used solely to determine whether the Section 213 threshold for bringing an on-time performance complaint has been met), that approach was rejected by a federal appeals court.

(4) Mechanisms for measuring and maintaining public benefits resulting from publicly funded freight or passenger rail improvements, including improvements directed towards shared-use right-of-way by passenger and freight rail.

While the STB does have jurisdiction over rail construction projects that may involve a public interest assessment, the Board does not have a particular (or specific) mechanism for measuring and maintaining public benefits for publicly-funded rail projects. Rather, the construction or extension of freight or passenger rail lines requires, on a case-by-case basis, prior Board authorization through the issuance of a certificate under 49 U.S.C. § 10901 (or through the "exemption process" under 49 U.S.C. § 10502).¹³ Section 10901(c) is a permissive licensing standard that directs the Board to grant rail line construction proposals "unless" it finds the proposal "inconsistent with the public convenience and necessity."¹⁴ Both the "public convenience and necessity" analysis and the exemption process consider the rail transportation policy of 49 U.S.C. § 10101.¹⁵

In the Amtrak context, the Board also has authority under PRIIA to award Amtrak damages that must be expended on improvements for underperforming routes. Specifically, if the Board determines (in a Section 213 enforcement proceeding) that Amtrak delays or failures to achieve minimum service standards are attributable to a

¹³ See, *e.g.*, *DesertXpress Enterprises, LLC—Petition for Declaratory Order*, FD 35544, slip op. at 3 (STB served Oct. 25, 2011).

¹⁴ Thus, Congress has established a presumption that rail construction projects are in the public interest. See *N. Plains Res. Council, Inc. v. STB*, 668 F.3d 1067, 1091-92 (9th Cir. 2011); *Mid States Coal. for Progress v. STB*, 345 F.3d 520, 552 (8th Cir. 2003).

¹⁵ *Dakota, Minn. & E. R.R. Constr. into the Powder River Basin*, 3 S.T.B. 847 (1998).

railroad's failure to honor Amtrak's statutory right to preference over freight transportation,¹⁶ the Board may award damages to Amtrak.¹⁷ Such damages "shall be used for capital or operating expenditures on the routes over which" the delays or diminished service quality were the result of the host railroad's failure to grant the required preference to passenger transportation.¹⁸ But as noted in the prior response, the Board has not taken action to apply this provision as the constitutionality of the PRIIA provision involved has remained in litigation.

(5) Approaches to operations, capacity, and cost estimation modeling that allow for transparent decision making and protect the proprietary interests of all parties.

The Board has extensive experience analyzing freight rail operations in large rate cases. In those cases, litigants develop a model to show the most cost-effective way to move traffic over a proposed network by using the "Rail Traffic Controller (RTC)," a software package produced by Berkeley Simulation Software, LLC. In preparing their cases, parties seed their RTC models with information drawn from real-world train movements, and the model then develops operating statistics and determines if there is enough capacity on the proposed alternative network. While the Board's experience with this information is freight-related only, it is our understanding that Amtrak also uses the RTC software and that both Amtrak and host railroads track trains in real-time using a variety of sensor systems, including positive train control. Therefore, it may be possible that this combination of software and real-world train movement data could be of assistance to the FRA in this task.

(6) Liability requirements and arrangements, including whether: to expand statutory liability limits to other parties; to revise current statutory liability limits; to establish alternative insurance models (including models administered by the Federal Government); and current insurance levels of passenger rail operators are adequate and whether to establish minimum insurance requirements for such passenger operators.

In 2009, Congress directed the Board to review liability issues surrounding agreements between passenger and freight rail entities, to the extent those agreements fall

¹⁶ See 49 U.S.C. § 24308(c).

¹⁷ 49 U.S.C. § 24308(f)(2).

¹⁸ 49 U.S.C. § 24308(f)(4).

within the agency's jurisdiction.¹⁹ On June 10, 2010, the Board delivered a letter report to the House Committee on Appropriations.²⁰

Issues of liability and insurance levels are not within the Board's primary jurisdiction, and therefore are rarely raised in Board proceedings. There are Board cases where certain contractual provisions between freight rail carriers and passenger rail entities governing construction, operations, access, and/or maintenance are relevant. However, as a general matter the Board does not evaluate terms involving liability, indemnification, or insurance levels. Disputes on these issues predominantly involve breach of contract and tortious actions with the courts as the proper forum. In limited circumstances the Board (or its predecessor agency, the Interstate Commerce Commission) is statutorily required to prescribe reasonable terms, conditions, and compensation when the parties themselves cannot agree. As noted in the June 2010 letter report, the Board has declined to interpret a Board-imposed provision in a way that would excuse a rail carrier from liability resulting from its own gross negligence or willful misconduct, finding such a provision to be contrary to public policy.²¹ In its decision, the Board explained that doing so would be contrary to its statutory mandate "to promote a safe and efficient rail transportation system" and "to operate transportation facilities and equipment without detriment to the public health and safety."²²

(7) Effect on rail passenger services, operations, liability limits, and insurance levels of the assertion of sovereign immunity by a State.

In its June 10, 2010 letter report, referenced in (6) above, the Board noted certain issues and discussed precedent related to the assertion of state sovereign immunity in the passenger rail context. As indicated by that letter, this issue generally arises in federal civil litigation or through state legislation²³—not in proceedings before the Board.

¹⁹ *Department of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010*, H.R. Rep. No. 111-366 (2009) (conf. Rep. to accompany H.R. 3288).

²⁰ See *Letter Report from Daniel R. Elliott, III, Chairman, Surface Transportation Board, to House Committee on Appropriations* (Jun. 10, 2010), available at <https://www.stb.gov/stb/docs/Liability%20Report%20letter%206-10.pdf>, at 3, 5-7, 9 (also referencing case law cited in U.S. Gov't Accountability Office, GAO-09-282, *Commuter Rail: Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations* (2009), which can be found at <http://www.gao.gov/new.items/d09282.pdf>).

²¹ *Boston & Maine Corp. v. New England Cent. R.R.*, F.D. 34612 (STB served Jan. 10, 2006); *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Springfield Terminal Ry.*, 3 S.T.B. 157, 162 (1998).

²² 49 U.S.C. § 10101(3) and (8).

²³ See, e.g., *Deweese v. Nat'l R.R. Passenger Corp.*, 590 F.3d 239 (3d Cir. 2009) (holding that Pennsylvania's sovereign immunity statute was preempted to the extent it conflicted with the Amtrak Reform Act, 49 U.S.C. § 28103); Fla. Stat § 341.302(17) (codifying that neither the contractual duties to

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Nevertheless, parties before the Board occasionally raise sovereign immunity arguments (though rarely in connection with passenger rail), and the Board has addressed them in limited situations.

For example, in *Florida Department of Transportation—Acquisition Exemption—Certain Assets of CSX Transportation, Inc.*, FD 35110 (STB served Dec. 15, 2010) (*FDOT-CSX*), Amtrak opposed a proposed “*State of Maine*” asset sale in part because FDOT (the purchaser) had asserted sovereign immunity and refused to enter into an indemnity agreement with Amtrak, allegedly imperiling the Amtrak passenger service that CSX (the seller) was obliged to support on the line.²⁴ The Board ultimately did not address the sovereign immunity question, however, because Amtrak voluntarily withdrew its opposition before a decision was issued.²⁵

In addition, the Board has addressed sovereign immunity in certain proceedings under the National Trails System Act (Trails Act), under which dormant rail lines may be converted into recreational trails, subject to possible future reactivation for rail purposes. As the Board has recognized, the Trails Act requires a trail sponsor (including a state) to assume full responsibility for “any legal liability” arising from its conversion of a railroad right-of-way into a trail,²⁶ yet the statute fails to address the fact that states and their political subdivisions enjoy some form of immunity from liability. This gap in the statute has been filled by regulations permitting an immune entity to serve as a trail sponsor, but only if it agrees to, among other things, indemnify the railroad against “any potential liability” the railroad might face.²⁷ In 2012, the Board reaffirmed this indemnification requirement, with only minor modifications, following a notice-and-comment rulemaking process.²⁸

indemnify, purchase insurance, nor establish a self-insurance retention fund may be construed as a waiver by Florida commuter rail entities of any sovereign immunity defense).

²⁴ See Nat’l R.R. Passenger Corp.’s Comments in Opp. To Florida Dep’t of Transp. Motion to Dismiss and Related Pet. to Revoke Exemption, filed Apr. 30, 2010, in *FDOT-CSX*.

²⁵ See *FDOT-CSX*, slip op. at 2; see also Nat’l R.R. Passenger Corp.’s Motion to Withdraw, filed Dec. 9, 2010, in *FDOT-CSX*.

²⁶ See 16 U.S.C. § 1247(d).

²⁷ See *Chesapeake R.R.—Certificate of Interm Trail Use & Termination of Modified Rail Certificate*, FD 32609, slip op. at 6 (STB served Feb. 24, 2011) (discussing 49 C.F.R. § 1152.29(a)(2)). “This indemnification requirement protects the railroads from liability arising out of trail use, as intended by the Trails Act, but still allows entities with immunity to serve as trail sponsors if they are able and willing to indemnify in lieu of accepting liability themselves.” *Id.* at 6-7.

²⁸ See *Nat’l Trails Sys. Act & R.R. Rights-of-Way*, EP 702 (STB served Apr. 30, 2012)

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Thank you again for the opportunity to assist in FRA's study on shared-use rail corridors. Please do not hesitate to contact me should you have questions or need additional information. I can be reached at 202-245-0236.

Sincerely,

A handwritten signature in cursive script that reads "Lucille L. Marvin".

Lucille L. Marvin
Director

Appendix D. Amtrak Response to the Federal Railroad Administration Request for Input

NATIONAL RAILROAD PASSENGER CORPORATION
1 Massachusetts Avenue, NW, Washington, DC 20001
Tel 202.908.2486 Fax 202.906.2850

Stephen J. Gardner
Executive Vice President and Chief Commercial Officer



October 1, 2018

The Honorable Ronald L. Batory
Federal Railroad Administrator
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Re: FAST Act Section 11311 (Shared Use Corridors Study)

Dear Mr. Batory:

Amtrak is pleased to provide the input that you requested, in your July 25 letter to Mr. Anderson on shared-use rail corridors for the study that the Federal Railroad Administration (FRA) is required to conduct by Section 11311 of the Fixing America's Surface Transportation (FAST) Act. We address separately, below, each of the statutory provisions your letter incorporated.

(1) [T]he access and use of railroad right-of-way by a rail carrier that does not own the right-of-way, such as passenger rail services that operate over privately-owned right-of-way, including an analysis of — (A) access agreements; (B) costs of access; and (C) the resolution of disputes relating to such access or costs

Amtrak's Statutory Access Rights

Prior to the creation of Amtrak, private railroads were required by their statutory common carrier obligation to provide intercity passenger rail service. The development of the highway and aviation networks, both of which received significant public funding, dramatically reduced usage of intercity passenger trains, resulting in large financial losses. By 1970, only 500 intercity passenger trains remained, and more than 100 of those trains were subject to pending discontinuance proceedings.¹ The then-record bankruptcy that June of the nation's largest railroad and passenger rail operator, the Penn Central Transportation Company, and its unsuccessful effort to discontinue all of its intercity passenger rail service outside of the Northeast, prompted Congress to take action.

The Rail Passenger Service Act (RPSA), enacted in October 1970, created the National Railroad Passenger Corporation (Amtrak), a federally chartered corporation charged with operating a national network of intercity passenger rail trains. In addition to preserving intercity passenger rail service, the RPSA relieved privately owned railroads from the financial burden of providing that service

¹ H.R. Rep. No. 91-1580 at 4736-37 (1970).

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themselves. This “public bargain,” whereby the private railroads were “relieved of any duty to provide passenger service in exchange for making their tracks available to Amtrak at incremental costs,”² continues to be embodied in the text of the RPSA. As the Surface Transportation Board (STB) has stated:

In [the Rail Passenger Service Act], Congress struck a fundamental bargain: in exchange for relieving the freight railroads of their obligation to provide passenger service – service that produced losses at levels threatening the viability of their freight operations – Congress created Amtrak and directed the railroads to permit it to operate passenger trains over their lines, and, in most instances, to give those trains preference over freight service.³

Much of the Congressional debate over the RPSA focused on high speed rail service. The initiation of the first high speed rail service in the United States, the New York-Washington *Metroliner*, the year before enactment of the RPSA had led to widespread recognition of the potential for developing high speed rail service on corridors throughout the United States. In testimony by the President of the Association of American Railroads, the railroad industry assured Congress that, if the RPSA were enacted, the railroads would be able to accommodate whatever high speed operations the new corporation sought to provide over their tracks:

If the Corporation so decides the trains will run at 150 miles an hour, the roadbed will be maintained for that operation at the Corporation [sic] expense.⁴

While the railroads’ conveyance of their intercity passenger rail service to Amtrak was voluntary, nearly all chose to do so because of the benefit of being relieved of their obligation to provide that service themselves.

The RPSA and several subsequent amendments provide Amtrak with the essential rights that enable it to fulfill its statutory mission. These rights, now codified at 49 U.S.C. 24308, include:

- Incremental cost-based access to any rail line in the United States, enabling Amtrak to gain access to lines required to provide and expand service;

² Interstate Commerce Commission, *Study of Interstate Commerce Commission Regulatory Responsibilities*, October 25, 1994, p. 62.

³ Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a) – Union Pacific R.R. and Southern Pacific Transportation Co., 3 S.T.B. 143, 147 (1998) (citations omitted).

⁴ *Passenger Train Service: Supplemental Hearings before the Subcommittee on Transportation and Aeronautics of the House of Representatives*, 91st Congress, June 1970, p. 114



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- Access, also at incremental cost, to other railroad facilities and services necessary to carry out the RPSA's purposes;
- Preference over freight trains;
- The right to operate additional trains; and
- Condemnation authority, enabling Amtrak to secure necessary assets for reasonable compensation when negotiations fail.

Amtrak's Operating Agreements with Host Railroads

Amtrak and the railroads whose passenger service it assumed negotiated a common contractual framework for Amtrak's day-to-day operations known as the "Basic Agreement." Over the years, this original Basic Agreement has evolved into the numerous individual "operating agreements" that Amtrak maintains with each of the railroads over which Amtrak trains operate.

Currently, Amtrak has operating agreements with 29 different "host" railroads that govern Amtrak's U.S. operations on the more than 95 percent of Amtrak's route system those railroads own and dispatch, which accounts for 72 percent of Amtrak's train miles. These host railroads include the six largest Class I railroads and their subsidiaries; 11 other freight railroads; and 12 state departments of transportation and regional transportation authorities, three of which own portions of the Northeast Corridor (NEC) between New York and Boston. While a few state-supported corridor routes on host railroads have frequent service, on most of its host railroad-owned National Network Amtrak operates one daily round trip or less over rail lines on which freight trains comprise the vast majority of the traffic.

Operating Agreement Terms

Among the key terms typically contained in Amtrak's host railroad operating agreements are provisions:

- committing the host railroad to provide the facilities and services Amtrak may request for the operation of intercity rail passenger service, including modified and emergency services;
- specifying agreed-upon schedules and speeds for Amtrak's trains;
- obligating the host railroad to maintain the tracks over which Amtrak trains operate at an agreed-upon "level of utility" standard;

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- requiring the host railroad to modify its rail lines upon Amtrak's request if such modification does not unduly interfere with the host's other operations;
- specifying agreed-upon compensation based upon incremental costs attributable to Amtrak, and how such compensation will be adjusted for inflation and may be redetermined;
- enabling the host to earn incentive payments based upon the on-time performance of Amtrak's trains while operating over the host;
- addressing dispute resolution, which are discussed below;
- apportioning liability, which are discussed in the response to issue 6; and
- specifying the term of the agreement.

Effectiveness of Amtrak's Statutory and Contractual Rights

For the most part, the statutory access rights that Congress gave Amtrak, and the operating agreements that establish the contractual relationship between Amtrak and its host railroads for Amtrak's operations under those rights, have enabled Amtrak to carry out its statutory mandate to operate a nationwide intercity passenger rail network. However, there are two major shortcomings that repeatedly thwart Amtrak's efforts to provide reliable, cost efficient service, and to expand that service as Congress intended to meet the growing demand for intercity passenger rail service.

The greatest shortcoming of the current statutory structure is the lack of any means for Amtrak to enforce one of its most important statutory rights – the right to preference over freight transportation. This issue is addressed in the response to issues 2 and 3 below.

The second major shortcoming is that host railroads are frequently able to prevent service expansion through excessive delay in fulfilling their statutory and contractual obligations to cooperate in service expansion planning efforts, and by making unreasonable demands for massive capital investments to accommodate modest increases in service. One recent example is discussed in Amtrak's response to issue 5 below.

An additional issue is that, notwithstanding their statutory obligations under 49 U.S.C. 24308(a) & (b) to accommodate Amtrak trains when "necessary" or "during an emergency," some host railroads have been unwilling to accommodate detouring Amtrak trains when their normal routes are unavailable due to the



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derailments, weather-related events or track work. This impairs Amtrak's ability to transport passengers to their destinations, sometimes when trains are already en route, and requires Amtrak to incur additional costs for alternate transportation.

Amtrak's Payments to Host Railroads

Under the RPSA, Amtrak's payments to host railroads are based upon incremental costs, with any additional payments dependent upon quality of service.

Amtrak compensates the host railroads for the incremental maintenance costs attributable to the wear and tear that occurs from Amtrak trains running over host railroads' tracks. The amount of the payment is typically a negotiated figure per mile figure based upon models that incorporate deterioration formulas for the various track components. Amtrak also compensates host railroads for other incremental costs incurred as a result of Amtrak's operations, such as the maintenance of host railroad tracks maintained to higher standards to accommodate Amtrak trains and the wages and benefits paid to host railroad personnel dedicated to providing services to Amtrak.

In addition, during Amtrak's 47-year existence, Amtrak, the federal government, Amtrak's state partners, and other governmental entities have invested many billions of dollars in host railroad-owned infrastructure to provide additional capacity for Amtrak's trains and to upgrade tracks. The majority of these investments have been made over the past decade, many as a result of the significant funding appropriated in 2009-10 for the federal capital grant programs that provided funding for FRA's High Speed and Intercity Passenger Rail grants. These investments have benefited host railroad-owned infrastructure also used by freight trains on virtually all of Amtrak's state-supported and long-distance routes.

Other Railroads' Access to Amtrak Infrastructure

A similar model of providing access to third party rights-of way is used between Amtrak and the regional transportation authorities and freight railroads that provide commuter and freight services on Amtrak's tracks, in which case Amtrak is the host.

Commuter Railroads

Along the Amtrak-owned portions of the Northeast Corridor (NEC), including the connecting lines to Springfield and Harrisburg, Amtrak provides access to Amtrak-owned tracks and facilities and services to nine state and regional transportation authorities for the purpose of operating commuter services. Amtrak

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has individual agreements with each of these agencies for access to rail infrastructure, and an agreement with Metra for its use of Amtrak-owned tracks and facilities at Chicago Union Station and Terminal.

Under 49 U.S.C. 24903(c)(2) (the "4R Act Access Provision"), the STB can order continuation of commuter (and freight) operations that existed in 1976 on the NEC and other rail lines acquired by Amtrak then, pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"). Operation of additional commuter rail services is subject to agreement between Amtrak and the commuter rail operator.

Unlike the situation on host railroad lines on which Amtrak operates, where the "tenant" (Amtrak) generally accounts for only a small percentage of train operations and where the infrastructure is configured for the host's freight operations, commuter authorities account for the vast majority (approximately 90 percent) of NEC trains and approximately half of NEC train miles. Infrastructure capacity and configuration on the NEC (e.g., number of tracks and interlockings, size and design of stations) are driven to a significant extent by the need to accommodate commuter trains that, unlike Amtrak's NEC trains, are heavily concentrated in weekday morning and evening peak periods and consume more track capacity due to frequent stops. Commuter train operations on the NEC have more than doubled since Amtrak acquired it in 1976.

Beyond the question of access rights and use, Section 212 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) created the NEC Commission on which Amtrak, the United States Department of Transportation (DOT) and FRA, NEC states, and NEC freight railroads (as non-voting members) are represented. It required the Commission to develop and implement a Cost Allocation Policy (Policy) that establishes uniform, proportionate, usage-based sharing of both operating and maintenance costs and capital reinvestment costs incurred by Amtrak and other owners of NEC infrastructure used by NEC operators who have obtained access rights statutorily or contractually. The costs subject to the Policy include the operating and capital costs of shared use access and infrastructure, including costs pertaining to maintenance of way, dispatching, stations, facilities, structures and policing, and appropriate overhead and additive rates.

The Policy was implemented on October 1, 2015. Amtrak and all NEC commuter agencies have amended or replaced previous access agreements so as to implement this new cost sharing approach. The approved Policy continues to be advanced to fulfill Congressional intent of creating a process to fully allocate all shared use costs, including costs associated with major investments needed to support infrastructure and capacity improvements, station investments, major backlog and mandated projects.



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Freight Railroads

Six freight railroads operate over various segments of the Amtrak-owned portions of the NEC (including the lines to Springfield and Harrisburg). Eight freight railroads operate over various segments of other rail lines that Amtrak owns or operates in Massachusetts, New York State, Michigan, and the Chicago and New Orleans areas. Most of the freight railroads operating over the NEC, and some freight railroads that operate over other Amtrak-owned lines, have statutory access rights under the 4R Act Access Provision and also have access rights under the NEC Freight Service Easement that Conrail retained when Amtrak acquired the NEC in 1976, to which these railroads succeeded when they acquired freight operating rights from Conrail.

Freight operations over rail lines owned by Amtrak are conducted pursuant to agreements between Amtrak and each freight railroad. The payments Amtrak receives from most of the freight railroads that operate over its lines have been negotiated.

Freight operations on rail lines Amtrak does not own, but maintains and dispatches pursuant to leases or agreements, are governed by agreements between the freight railroad and the track owner, or between Amtrak and the freight railroad on freight railroad-owned lines.

Dispute Resolution

Disputes regarding access and contractual rights between Amtrak and the railroads it operates over, or that operate over Amtrak-owned lines, are resolved in a variety of different ways.

- The RPSA provides for STB resolution of most disputes involving Amtrak's statutory access to host railroad facilities and services. Most of Amtrak's agreements for operations over host freight railroads call for STB adjudication of disputes over redetermination of compensation.
- As discussed above, the STB is also empowered to order continuation of, and determine compensation for, freight and commuter operations on Amtrak-owned lines that are subject to the 4R Act Access Provision. Such compensation (i) cannot cross-subsidize intercity rail passenger, commuter rail passenger or freight rail transportation, and (ii) must provide for the freight or commuter rail operator to bear the costs Amtrak incurs solely for its benefit, and a proportionate, usage-based share of other costs.⁵

⁵ 49 U.S.C. 24903(c)(2)

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- Most of Amtrak's operating agreements with host freight railroads, and some of the agreements governing freight railroad operations over Amtrak's lines, call for resolution of contractual disputes by the National Arbitration Panel (NAP). The NAP is a standing arbitration panel, with freight railroad and Amtrak-appointed arbitrators who select a neutral arbitrator, established in conjunction with the 1971 Basic Agreements. Most agreements not subject to NAP arbitration contain clauses providing for resolution of contractual disputes by ad hoc arbitration panels.
- Agreements governing commuter operations on Amtrak's lines contain a variety of dispute resolution processes that ultimately allow for arbitration or litigation of contractual disputes if a resolution cannot be reached.
- Disputes involving the interpretation and application of the NEC Cost Allocation Policy, including access and capital cost allocation calculations, may follow the Policy's dispute resolution protocols, under which the parties may request that disputes be resolved by the STB through adjudication, mediation or other form of Alternate Dispute Resolution. By mutual agreement, disputes can also be resolved via federal court litigation.

The most significant impediment to timely and efficient resolution of shared use disputes in which Amtrak is involved is the expense and time required for STB adjudication. Such litigation can take years before issuance of a decision, frustrating Amtrak's efforts to fulfill its statutory directives. As discussed in Amtrak's response to issues 2 and 3 below, there is also currently no mechanism via which Amtrak can directly enforce its vital statutory right to preference over freight transportation.



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(2) Effectiveness of existing contractual, statutory, and regulatory mechanisms for establishing, measuring, and enforcing train performance standards, including how delays are recorded and assigned, and the use of incentives/penalties

and

(3) Identify the strengths or weaknesses of those existing mechanisms and possible approaches to address the weaknesses.

Amtrak's Operations over Host Railroads

Recording and Assignment of Delays

Amtrak has a very effective electronic delay reporting (eDR) system used by its conductors to record all delays to Amtrak trains and assign them as host-responsible, Amtrak-responsible, or caused by a third party. In 2017, Amtrak's Office of Inspector General (Amtrak OIG) reviewed Amtrak's delay reporting on host railroads and found it generally accurate. In fact, the Amtrak OIG found that Amtrak tended to understate delays on its long-distance and state-supported routes.⁶ Amtrak has addressed the report's recommendations to further improve its system, all of which were fully closed by August 15, 2017. Amtrak also swiftly resolves any questions or issues raised by its host railroads.

Existing Contractual, Statutory and Regulatory Mechanisms

Amtrak's statutory "preference over freight transportation in using a rail line, junction, or crossing"⁷ is the primary train performance standard. The RPSA of 1970 that created Amtrak, did not include a right to preference. However, after Amtrak suffered from poor performance on freight railroads, Congress included in the Amtrak Improvement Act of 1973 a provision establishing Amtrak's preference rights. That provision, which is codified at 49 U.S.C. 24308(c), states that:

Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection.

⁶ Amtrak Office of Inspector General Report number OIG-A-2017-007, dated March 2, 2017 (<https://amtrakoig.gov/sites/default/files/reports/OIG-A-2017-007.pdf>).

⁷ 49 USC § 24308(c)

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A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.

In addition, Congress has established a legislative goal that Amtrak operate its "trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public time tables."⁸

Despite the language of the RPSA, some host railroads daily make dispatching decisions that give priority to freight over Amtrak's passengers. Congress attempted to address that chronic problem in PRIIA. Section 207 of PRIIA directed FRA and Amtrak, in consultation with the STB, host railroads and other stakeholders, to jointly develop "metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." Section 213 of PRIIA authorized the STB to initiate an investigation for failure to meet Section 207's metrics or 80 percent on-time performance, and to provide relief in the event delays were found to be due to preference violations.

The PRIIA Section 207 metrics and standards, and portions of PRIIA Section 213, were challenged by the Association of American Railroads and several freight railroads after they were issued in 2010. While Amtrak passengers continue to experience delays each day due to failures to provide preference, the already more than eight-year old litigation over these statutory mandates continues unabated. If it is resolved in the United States' favor, it can be expected to be followed by a lengthy process of developing and issuing new metrics and standards that may be subject to further judicial challenges. While it is possible that, at some future date, the STB may once again be empowered to investigate and enforce Amtrak's preference, there is a pressing need for an immediate and an effective legal remedy for preference violations that delay thousands of Amtrak passengers every day.

Contractual provisions have not been effective in encouraging compliance with Amtrak's preference rights. By law, all operating agreements between Amtrak and a host must include a penalty for untimely performance.⁹ However, host railroads have not been willing to agree to contractual penalties that exceed incentives earned during a limited "lookback" period, which effectively nullifies the effect of the required penalties on poorly performing host railroads. In a pending proceeding with one host railroad before the STB, Amtrak has advocated for an alternate approach to the incentive and penalty structure to reflect

⁸ 49 USC § 24101(c)(4)

⁹ 49 USC § 24308(a)(1)

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Congress's intent that incentives be paid only for good performance and that poor performance be penalized.

Effectiveness and Suggested Improvements

Amtrak's on-time performance (OTP) on most host railroads is poor. In FY17, long-distance trains were on time at their station stops only 47 percent of the time, a decline of seven percentage points compared to FY16. During FY17, Amtrak trains experienced nearly 17,000 hours of delay due to freight train interference (FTI) on host railroads. Through August 31, 2018, FY18 all-stations OTP declined further to 44.6%.

In 2008, the DOT's Office of Inspector General (DOT-OIG) found that "host railroads acknowledged that they have certain dispatching practices that deliberately delay Amtrak trains,"¹⁰ and reported that poor OTP reduces ridership and dramatically increases costs.¹¹ Conversely, reducing delays and improving OTP would increase Amtrak's revenue, reduce costs and, most importantly, reduce federal funding requirements.

The existence of a mechanism to enforce Amtrak's statutory preference correlates closely to OTP on host railroads. Significant OTP improvements followed the enactment of preference in 1973, a United States Department of Justice (DOJ) preference enforcement action in 1979, and the passage of PRIIA in 2008. Similarly, the absence of an enforcement mechanism encourages hosts to engage in dispatching practices that prioritize freight over Amtrak trains, resulting in increased host railroad-responsible delays, primarily due to FTI, and eroding OTP. Since a court ruling in July 2017 limiting the effectiveness of the STB's investigatory powers, minutes of FTI delay have increased by 21 percent. Because DOJ, the only entity presently authorized to enforce preference,¹² has only done so just once in Amtrak's 47-year history,¹³ violations of Amtrak's preference rights will continue, at huge cost to Amtrak, its passengers, and the federal and state governments, until an effective legal remedy to curtail them is provided.

¹⁰ DOT-OIG, *Root Causes of Amtrak Train Delays*, Report No. CR-2008-076, Sept. 8, 2008 (https://www.oig.dot.gov/sites/default/files/Amtrak_Root_Causes_Final_Report_9_8_08_with_508_charts.pdf), p. 7.

¹¹ DOT-OIG, *Effects of Amtrak's Poor On-Time Performance*, Report No. CR-2008-047, March 28, 2008, (https://www.oig.dot.gov/sites/default/files/effects_of_otp_report_FINAL.pdf), p. 12.

¹² 49 USC § 24103

¹³ *U.S. v. Southern Pacific R.R. Co.*, C.A. No. 79-3394 (D.D.C) (preliminary injunction order entered Dec. 21, 1979).



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The DOT-OIG recommended that FRA seek legislative changes that would provide Amtrak with the ability to enforce preference.¹⁴ Amtrak recommends that DOT and FRA support Amtrak's request, in Amtrak's FY19 General and Legislative Annual Report and Grant Request (Leg and Grant), for a private right of action to enforce preference. Enactment of the statutory amendment, whose proposed language is included in the Leg and Grant along with a more detailed justification, would permit Amtrak to bring a civil action to enforce preference, just as any other company would have a legal remedy if its legal rights were being violated.¹⁵

Amtrak as Host Railroad

There are no federal statutes or regulations defining OTP goals for commuter train operations on Amtrak-owned infrastructure or requiring commuter railroads to agree to payments based upon Amtrak's performance. Amtrak does have performance incentives in place with several commuter agencies and regularly conducts performance review meetings with all commuter agencies to assess performance and discuss possible corrective steps. In general, Amtrak achieves consistently high levels of OTP for our commuter tenants on the NEC, often exceeding 90 percent. This is considerably higher than the performance of our own trains over the NEC that must contend with operating significantly longer distances and that can be delayed while operating through the various commuter territories along the NEC.

The NEC Commission's Policy calls for an annual performance review that includes an evaluation of operating performance of train service. The Commission develops and presents a quarterly high level report of operating performance, included summaries of causes of delay.

(4) Mechanisms for measuring and maintaining public benefits resulting from publicly funded freight or passenger rail improvements, including improvements directed towards shared-use right-of-way by passenger and freight rail

Amtrak depends on public grants, primarily from the federal government and state partners, to fund improvements on host railroad lines. This situation creates the need for a mechanism to measure and maintain public benefits resulting from these public expenditures.

¹⁴ DOT-OIG Report No. CR-2008-076, p. 24.

¹⁵ *Amtrak General and Legislative Annual Report & Fiscal Year 2019 Grant Request*, Feb. 15, 2108 (<https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/reports/Amtrak-General-Legislative-Annual-Report-FY2019-Grant-Request.pdf>), pp. 42-43.

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Service Outcome Agreements (SOAs) meet this need. They are binding agreements stating what funds will be invested in a host railroad line; what the outcome of that investment that benefits intercity passenger rail service will be; what monitoring methods will track these Service Outcomes; and what enforcement mechanisms will be invoked if the agreed Service Outcomes are not realized after the public investment has been made. The Service Outcomes as a result of improvements usually include additional frequencies, reduced scheduled trip times, and/or reduced minutes of host-responsible delay. Parties to an SOA are the host railroad receiving the investment and controlling delivery of the Service Outcomes; the party(ies) making the investment, usually public entities; and the passenger train operator, usually Amtrak. The term of an SOA, typically twenty years, approximates the minimum useful life of most track assets purchased with public funds.

Use of SOAs supports good project selection, since they codify the public benefits that will be realized as a result of public investments, and good financial stewardship by helping ensure that public investments actually yield the intended benefit.

Measurement of Service Outcomes is straightforward. Additional frequencies and reduced scheduled trip time can be directly observed, and reduced minutes of host-responsible delay are measured using the eDR reporting system under which delays are captured by Amtrak and shared with the host railroad. Enforcement procedures typically start with routine measurement of Service Outcomes against standards established in the SOA. If performance falls short for a period of time, the process escalates to performance calls and meetings, then a request by the public entity that made the investment to the host railroad for corrective action, and ultimately enforcement of specific performance by the host of the Service Outcomes committed to in the SOA.

SOAs were first widely used as part of the HSIPR grant program, under which grants were made by DOT to state partners who in turn made the funds available to the host railroads who constructed the improvements. There are fifteen SOAs in place with nine host railroads and eleven state partners as a result of HSIPR grants during that period. Of these SOAs, six are out of compliance, all due to host-responsible delays above the standards set in the SOAs, and some state partners have escalated to asking the host railroad for corrective action plans.

This result illustrates the need for SOAs. Realization of intended public benefits on shared-use rights-of-way is not a sure thing. Without SOAs there would be no recourse after construction to require the host to ensure those benefits, which are within its exclusive control, are achieved.

Some hosts may not agree to SOA terms. In such situations, it may be preferable to utilize available funds for another project, even though the initial project will not be built, rather than investing without an SOA and finding that significant public dollars do not produce the intended public benefits.



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The SOAs executed during 2010-2012 were at times difficult to negotiate. This was due partly to the concept being new, but more importantly that grants had been awarded before the SOA terms were finalized, thus reducing public sector leverage.

Amtrak recommends that SOAs continue to be used when the assets being improved to benefit passenger rail service are not under the control of either the party funding the improvement or the operator of the passenger rail service. In such situations, the host railroad may not have an incentive to ensure that the public investments in its property produce the intended public benefits. Grant applications could stipulate that if the full grant amount requested is awarded and the improvements are constructed as envisioned, the host railroad will be responsible for delivering the specific Service Outcomes under the SOA terms contained in the application, without post-grant-award negotiation of SOA terms. States and Amtrak should both be empowered to enforce SOAs.

Enforcement would use an escalation culminating in specific performance of the host's obligations as described above, rather than, for example, return of grant funds. Host railroads will be reluctant to accept funding that they may be at risk to repay, and the public wants the promised benefits rather than a return of its funds.

(5) Approaches to operations, capacity, and cost estimation modeling that allow for transparent decision making and protect the proprietary interests of all parties

Amtrak's comments addressing this issue focus on the scenario of publicly-funded infrastructure investments to support Amtrak service on freight railroad-owned infrastructure. In the case of the NEC, a separate framework exists to protect the interests of various stakeholders, with contributions to infrastructure investments governed largely by PRIIA Section 212 and guided by the NEC Commission. Because of this unique framework, in which all stakeholders participate in modeling and determining investment needs, some of Amtrak's comments are not applicable to the NEC.

How operations and capacity modeling for additional or new services is conducted is of critical importance to the improvement and expansion of intercity passenger rail service. Improperly done modeling exercises based upon unreasonable, gold-plated assumptions that do not take into account Amtrak's statutory rights can dramatically overstate the capital investments needed for even modest increases in passenger rail service, resulting in unnecessary taxpayer-funded expenses in privately-owned infrastructure or no new service at all.

One recent example illustrates this point. At the direction of Congress, Amtrak participated in a study, led by FRA, of restoring service on a long-distance route that had operated tri-weekly until 2005 on a 515-mile rail line with light-to-moderate freight traffic, and adding a daily round trip, also previously

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operated, over a 145-mile corridor segment on that route. A host railroad-selected modeling consultant conducted a study that relied upon unvetted assumptions determined unilaterally by the host railroad, including that there would be large future increases in freight traffic and frequent lengthy bridge openings for maritime traffic that do not occur today. The host railroad then demanded \$2.3 billion for construction of 144 miles of additional track and replacement of numerous bridges to accommodate restoration of long-distance service on a daily basis and the single 145-mile corridor round trip.

Shortly after the completion of the study, the host railroad adopted major changes in its operating practices to improve efficiency. They resulted in the removal of through freight traffic from the majority of the route and significant reductions in the number of freight trains operating over the remainder of the route. Had the investment of \$2.3 billion in public money the railroad sought been made, that money would have been wasted.

Because several high quality modeling tools are available today, Amtrak does not see an urgent need for government- or industry-led development of entirely new technical resources. What are needed are changes in the way modeling is done to ensure that it is transparent, unbiased, unreliant upon speculative projections about future freight traffic levels, and consistent with Amtrak's statutory access rights.

Modeling is not a necessary prerequisite to all Amtrak requests to add additional trains on host railroad lines. The RPSA requires that Amtrak be allowed to operate additional trains unless they will "impair unreasonably" the host's freight operations, with the host having the burden of proof on that issue.¹⁶ In situations where modeling is undertaken to help determine publicly-funded investments needed to support intercity passenger rail service, it should follow the following three principles:

- **Recognize that no operations or capacity model provides a precise "right answer."** Models estimate the effect of a scenario a party inputs into the model. In other words, the model user must determine what potential operations and capacity investment scenarios to test, and the model then estimates what would happen in each of those scenarios. Models do not indicate whether there are lower-cost or more-effective alternatives – the humans using the model must develop such alternatives and test them in the model. When a model says that a costly investment in new infrastructure would support additional intercity passenger rail service, there may be other less costly investments that would be equally effective but that the modeler did not test. Modeling exercises also involve numerous assumptions, judgment calls, and other often subjective decisions that can have a major effect on results.

¹⁶ 49 U.S.C. 24308(e)

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- **All parties must participate equally in the modeling process.** For the reasons described above, all parties must have full access to the model, input data, detailed model results, scenarios that are tested, and other information used and produced by the modeling exercise. (Any legitimate concerns about confidentiality can be addressed by confidentiality agreements.) All parties should also concur with the assumptions used and scenarios modeled.
- **Modeling should recognize Amtrak's statutory rights to incremental cost access and operation of additional trains.**

Unfortunately, many recent modeling exercises have not followed these principles, resulting in greatly inflated cost estimates for improvements to intercity passenger rail services. Specific issues have included:

- **Allowing a party with a stake in the outcome (usually the host railroad) to do the modeling and then share its answer with the other parties.** This limits the ability of other parties to question assumptions and to propose or test alternative sets of investments. It also leads to information asymmetry in subsequent negotiations.
- **Modeling for "zero impact" to freight operations.** As discussed above, by law Amtrak intercity passenger trains may be added if they do not unreasonably impair freight transportation. Some modeling exercises seek to identify investments that cause intercity passenger trains to have zero impact on freight operations. The difference between "unreasonably impair" and "zero" may exponentially increase infrastructure costs.
- **Basing modeling on theoretical future freight traffic volumes.** Some recent modeling exercises have based infrastructure proposals on assumed growth in freight traffic, sometimes decades in the future, rather than current freight operations. This has the effect of causing the intercity passenger rail project to pay not only for the infrastructure presently needed for intercity passenger rail service, but also to support speculative assumptions of freight traffic growth unrelated to intercity passenger rail service. This approach also ignores the fact that future improvements in railroad technology and operations, such as those that will result from increased automation, improvements in freight train scheduling and full implementation of positive train control, will allow existing track infrastructure to accommodate increased freight traffic, just as the doublestack trains and heavy axle cars introduced in recent decades have enabled railroads to handle higher volumes of freight tonnage on fewer track miles.



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Amtrak recommends that stakeholders employ the following approaches to ensure that modeling is unbiased and transparent.

- All participants jointly hire an independent third-party modeler. Numerous such firms exist, and often conduct independent modeling on behalf of freight railroads for investments that will be jointly funded by multiple freight railroads. In addition to having no specific stake in the outcome of the modeling, having an independent third party can facilitate handling of confidential and proprietary data.
- Seek to reach consensus during the modeling process on what instructions to give the modeler regarding the assumptions, subjective judgements, and modeling objectives.
- If consensus cannot be reached, the determination of what assumptions should be used should be made by an unbiased third party, or the third-party modeler should be directed to develop two versions of the model run – one with each party’s assumptions. The parties can then continue their negotiations from a more informed perspective in the hope of resolving differences on necessary capital investments without litigation.

(6) Liability requirements and arrangements, including whether: to expand statutory liability limits to other parties; to revise current statutory liability limits; to establish alternative insurance models (including models administered by the Federal Government); and current insurance levels of passenger rail operators are adequate and whether to establish minimum insurance requirements for such passenger operators

Amtrak’s Current Liability Arrangements

Freight Railroads

Amtrak has long had liability allocation/indemnity agreements in place with its host railroads, as well as with those freight railroads that use Amtrak’s lines for their freight operations. These agreements make clear how liability will be allocated between Amtrak and the freight railroad when an incident occurs, and identify rights to indemnification. Currently, Amtrak’s operating agreements with most freight railroads provide for an “each takes its own” liability apportionment and are not based upon fault. Under this approach, each railroad assumes responsibility for its own employees and property, and Amtrak assumes responsibility for its passengers. Significant efficiencies, certainty of process, and public interest benefits flow from these arrangements.



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State Partners

Amtrak also contracts with many state departments of transportation and other state authorities to provide state-supported services in corridors of less than 750 miles outside the NEC. The arrangements vary depending upon the state involved, but generally Amtrak indemnifies states for liability or damage arising from the operation of the state-supported service. Amtrak pools the risks of state-supported rail operations with its long-distance and NEC operations, and insures these risks through its liability and property insurance programs. In exchange for Amtrak's indemnification, states pay Amtrak, under Section 209 of PRIIA an allocated share of Amtrak's costs to self-insure and insure the state-supported operations. In some cases, there are insurance arrangements limiting retained liability for damage to Amtrak-owned and state-owned rolling stock used in state-supported services.

Commuter Agencies

Generally, the liability arrangement under Amtrak's agreements for commuter agencies' operations on the NEC is a "but for" indemnity arrangement. Under this approach, the commuter agency indemnifies Amtrak for death, personal injuries, and property damage/loss to the commuter's employees, passengers of Amtrak and the commuter agency and damage to commuter agency property and Amtrak property, including Amtrak infrastructure, that would not have occurred in the absence of ("but for") the commuter operation.

49 U.S.C. Sec. 28103 Statutory Cap

49 U.S.C. Sec. 28103 was enacted as part of the Amtrak Reform and Accountability Act of 1997¹⁷ (Amtrak Reform Act). As amended, it provides that the aggregate allowable awards to all rail passengers, against all defendants, for all claims, including claims for punitive damages, for personal injury to a passenger, death of a passenger, or damage to property of a passenger arising from a single accident or incident arising out of the provision of rail passenger transportation, shall not exceed a cap (currently approximately \$294.3 million), with future adjustments based upon changes to the Consumer Price Index-All Urban Consumers every five years.

The Amtrak Reform Act's purpose was to address an "urgent need" to improve Amtrak's financial condition, which was at a "crisis stage," and provide statutory reforms aimed at reducing Amtrak's costs, increasing its efficiencies and revenues and thereby improve its financial condition.¹⁸ While the statute's legislative history does not specifically discuss the statutory cap provision, in establishing the cap

¹⁷ Pub. L. 105-134, 111 Stat. 2577 (1997).

¹⁸ S. Rep. No. 105-85 at 1-2 and 12 (1997).

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Congress was striking a balance between competing interests. Congress had a strong concern for Amtrak's viability as a financially sound corporation providing efficient rail passenger transportation services. On the other hand, Congress would have had an understandable concern for the rights of passengers to obtain a fair measure of compensation in the event of a major accident, and if warranted, to recover punitive damages. It arrived at what it considered to be a fair cap. The cap allows Amtrak to manage its liability insurance costs and still provides fair and reasonable compensation for its passengers in a catastrophic accident. It also facilitates prompt settlements for passengers who are injured or the families of those who die in an accident, as it encourages all parties to focus on how to fairly divide up a finite amount of money rather than create expectations for runaway verdicts.

As the statute seeks to address the **activity** of providing rail passenger transportation services, there is no reason to limit its application to passengers claiming losses. Claims made by motorists, pedestrians, and others resulting from an incident arising out of the provision of rail passenger transportation services should be similarly addressed. From passengers' perspectives, it may seem unfair that the losses they have suffered are subject to a cap while third parties do not have such a cap. Conversely, defendants are subjected to what could amount to unlimited liability to third parties, which significantly increases insurance costs and self-insurance exposure.

Establishing a reasonable cap applicable to all claimants in such incidents will result in greater fairness to plaintiffs and defendants alike, and will provide greater guidance for courts and jurors in allocating compensation. The inclusion of non-passenger claims in the liability cap would lower the cost of insurance as the amount of insurance bought would typically not exceed the cap. Moreover, the public taxpayer has an interest in a uniform cap, given the increasingly important role passenger rail service plays in today's economy and the fact that this service (and its inherent deficit operations) are financed with public funding.

Congress revisited its analysis following the May 12, 2015, derailment of Amtrak Train 188 in Philadelphia and retroactively adjusted the cap in a 2015 amendment from \$200 million to approximately \$294.3 million. Amtrak subsequently settled all claims, including non-passenger claims, below this capped amount. However, this retroactive adjustment created a difficult market for Amtrak when it subsequently had to renew its excess insurance liability coverage because the underwriters questioned whether the cap could be relied upon in assessing Amtrak's exposure. The underwriters noted that the coverage provided to Amtrak prior to the retroactive adjustment by nearly 50 percent was priced based upon a \$200 million cap. This resulted in increased premiums for Amtrak and fewer insurers willing to write excess coverage.

Accordingly, Congress already having already invested great thought on the subject and having only recently revisited the issue, there is no basis for adjusting the cap upward beyond the current statutory



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level even with the inclusion of non-passenger claims, as adjustments are automatically made pursuant to the Consumer Price Index. Amtrak hopes that, now that future adjustments are automatic based upon inflation, there is no longer the possibility that the cap will be retroactively increased in the future. Any future retroactive adjustment would undermine the ability of Amtrak and other rail carriers to control insurance and liability costs in the future.

49 U.S.C. Sec. 28103 Insurance Requirement for Amtrak

49 U.S.C. Sec. 28103(c) requires Amtrak to maintain a total minimum liability coverage for claims through insurance and self-insurance of at least \$200 million dollars per accident or incident. Congress did not amend this coverage requirement when it adjusted the statutory cap. Amtrak's insurance program provides coverage greater than this cap.

It is unfair that Amtrak is the only provider of passenger rail service subject to an insurance requirement. It is also truly remarkable – and quite disturbing – that existing federal laws and regulations require operators of airport shuttle buses to carry specified levels of insurance,¹⁹ but allow companies (other than Amtrak) to operate passenger and high speed trains carrying hundreds of passengers through densely populated areas without *any* insurance coverage. The need to assure that sufficient financial resources are available to satisfy a substantial exposure should one arise is even more compelling when an entity other than Amtrak is providing rail passenger transportation services. Most of the private companies that provide passenger rail service in the United States are subsidiaries of foreign corporations, sometimes newly formed for the purpose of competing for a specific U.S. contract, that, in the absence of insurance coverage, are likely to lack the significant financial assets required to compensate injured parties or family members of decedents for claims arising out of a major incident.

Amtrak recommends that there be established a minimum liability insurance requirement for all entities engaged in rail passenger service. The statutory required amount of insurance should be at least \$294.3 million in light of the cap (which Amtrak believes should include non-passenger claims). This amount of insurance should protect all of the passengers in a catastrophic accident and provide coverage for others not currently covered by the cap, such as employees and third parties. Also, the statutory amount of insurance should be adjustable with any future cap adjustment.

¹⁹ See <https://www.fmcsa.dot.gov/registration/insurance-requirements>.



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Alternative Insurance Options

Amtrak recognizes that some commuter agencies may have concerns about the cost or availability of the necessary levels of insurance in the current market. Therefore, Amtrak recommends that, in addition to requiring adequate levels of insurance, Congress also study the potential for a private insurance pool or creation of a government sponsored/managed insurance program.

For example, a private insurance pool could use a captive insurance company to collect premiums from rail providers (participants), pay losses for its participants and purchase reinsurance. The pool could also fund loss/risk consulting for the benefit of the participants. A pool's coverage and service focus tends to be more specific and responsive to its participants, since the "customers" are in fact themselves.

A government sponsored program such as Price-Anderson Act program for the nuclear power plants also could be a model for the rail industry. This would allow Amtrak, commuter agencies, the states and possibly freight railroads upon which passenger trains operate to jointly secure excess insurance, and if a catastrophic accident occurred that created exposure beyond available excess coverage the federal government could provide additional funding to cover the loss. There are other similar government programs such as the terrorism insurance established to compensate victims following the 9/11 attack.

Alternate insurance models, such as private insurance pools or governmentally sponsored or managed insurance programs, potentially offers certain benefits:

- Geographic diversification of the underwriting portfolio;
- Reduction in variability of losses due to the wider spread of risks;
- Stabilization of cash flow;
- Longer term view of risks; and
- Broader coverage than might be commercially available in certain instances.

Hurdles for all of these alternatives could include:

- While members share in losses, they lack input on loss control and claims management by other members;



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- Governmental entities and quasi-governmental organizations enjoy the benefits of sovereign immunity (discussed in 7 below), which lessens the need to participate in an alternative insurance arrangement;
- Anti-deficiency laws inhibit the ability to share in unplanned loss assessments;
- Variability of safety and risk profiles for participants;
- Gaining support of commercial insurance carriers, which may be reluctant to underwrite in conjunction with an alternative arrangement, or drop down when losses from another pool member erode underlying limits for its insured; and
- Risk of financial hardship due to claims.

Northeast Corridor Commission

Currently, the NEC Commission is conducting a study of railroad liability issues on the NEC. As part of its study, the Commission has been examining insurance mechanisms to more fairly and economically provide for liability insurance to cover the operators on the NEC. One of the approaches under consideration is to establish a captive insurance company to cover such liability. While Amtrak agree this is a potential cost saving mechanism for rail carriers worth further investigation, Amtrak strongly disagrees with any fault-based carve-outs for major accidents. Such an arrangement would drive up the transaction costs, such as legal fees and expert expenses, while delaying resolution for years with the injured parties. Inevitably, insurance premiums would also increase due to the increased litigation expenses and the delay in resolving cases.

(7) Effect on rail passenger services, operations, liability limits, and insurance levels of the assertion of sovereign immunity by a state.

The assertion of sovereign immunity shifts both liability and its associated costs to the non-immune parties.

Many states still retain the traditional rule of "joint and several liability." Under this rule, a plaintiff can collect the full amount of damages from one defendant, even though multiple defendants were at fault. In such cases, when one defendant claims sovereign immunity - such as when a commuter authority seeks to avoid its contractual obligation to indemnify Amtrak for claims from an injured commuter passenger - the remaining defendant must pay the entire verdict, even though it may be only 1 percent liable. This results in greater financial exposure to the defendant who does not enjoy such immunity. In the case of entities

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The Honorable Ronald L. Batory
October 1, 2018
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such as Amtrak that provide public services but do not enjoy the benefits of sovereign immunity, greater insurance coverage must be purchased to protect against these greater potential exposures.

State sovereign immunity laws limit, and in some cases, may preclude entirely, rail passengers from obtaining compensation from a state for losses involving injuries and deaths resulting from negligence by the state or its rail contractor. This has the effect of making Amtrak or other entities the "deep pocket" even if they had little to do with the cause of the accident.

Sovereign immunity laws have also prompted assertions by some states that they cannot enter into agreements allocating liability among rail users, such as the no-fault arrangements incorporated into nearly all Amtrak-host railroad agreements, and that liability apportionment agreements with Amtrak to which they are already parties cannot be enforced against them.

Uncertainty regarding who will be responsible for compensating injured parties is exacerbated by the fact that sovereign immunity laws differ from state to state, and that a state or state agency can declare, after a rail incident occurs, that the liability apportionment provisions in an agreement under which it has operated for years are unenforceable.

Amtrak should not be required to essentially "subsidize" states who have the benefit of sovereign immunity and are thereby able to shift their liability to Amtrak. Any state receiving federal funds for rail operations, or that enjoys the benefits of operating trains over the Northeast Corridor and other rail lines that have received large federal infrastructure investments, should be required to make an effective waiver of such immunity, as many commuter authorities have done in order to secure the right to operate commuter rail services over privately-owned rail lines.

Amtrak appreciates the opportunity to provide its comments on these important issues. Please do not hesitate to contact me if you have any questions or wish any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen J. Gardner".

Stephen J. Gardner
Executive Vice President and Chief Commercial Officer

cc: Richard H. Anderson

Appendix E. Association of American Railroads Response to the Federal Railroad Administration Request for Input



ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, SW, Suite 1000
Washington, D.C. 20024

Timothy J. Strafford
Associate General Counsel
& Corporate Secretary

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September 22, 2018

Ms. Frances Bourne
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Via E-mail

Dear Ms. Bourne:

The Association of American Railroads ("AAR") writes in response to the request by the Federal Railroad Administration ("FRA") for input on a study that evaluates the shared use of right-of-way by passenger and freight railroads as required by Section 11311 of the Fixing America's Surface Transportation Act ("FAST Act"). Congress has directed the U.S. Department of Transportation ("DOT") to consider the operational, institutional, and legal structures that best support improvements to the U.S. rail network. The AAR appreciates the opportunity to comment on this important topic.

The AAR's freight railroad members, which include the seven large U.S. Class I railroads as well as approximately 170 short line and regional railroads, account for the vast majority of the freight rail mileage, employees, and traffic in the United States, Canada and Mexico. The National Railroad Passenger Corporation ("Amtrak") and commuter railroads are also members of the AAR. The AAR's comments in this letter reflect the perspective of its freight railroad members only.

The United States is connected by the most efficient, affordable, and environmentally-responsible freight rail system in the world. Passenger railroading plays an important role in meeting the transportation needs of the public, while alleviating highway and airport congestion, and reducing pollution. Today, the overwhelming majority of intercity passenger rail service operated by Amtrak and local commuter service provided by state and local agencies or private operators is conducted on right-of-way and infrastructure on tracks owned and maintained by host freight railroads. While separate corridors for freight and passengers would be desirable, the practical reality is that passenger rail may continue to share tracks and rights-of-way with freight railroads for the foreseeable future.

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Given this reality and the complexity of existing railroad operations, it is essential that shared use of rail corridors be based on negotiated agreements with the infrastructure owners/host railroads. Agreements that grant access to the privately-owned rail network should be negotiated on a voluntary, case-by-case basis and must address site-specific safety, operational, compensation and legal issues. The individual circumstances of each corridor must be reflected in those agreements. Amtrak's statutory right of access to host freight railroad infrastructure is the result of its unique history and does not extend to other passenger operators. In addition, the following four principles must be taken into account:

- (1) **SAFETY:** Agreements must give paramount attention to safety. Safety issues must be addressed in light of the operating characteristics and/or volumes and frequencies of both the freight and passenger traffic and freight rail availability of right-of-way on a given corridor. Agreements must also include strategies for mitigating risks including, but not limited to: highway grade crossings enhancements including sealed corridors, where necessary; safe placement and configuration of passenger stations; separation between existing and proposed tracks; train control systems, including positive train control, or other advanced technologies (either required by regulation or designated by host railroads); track and bridge upgrades; incremental track maintenance and component replacements; use of wayside detector devices; and intrusion prevention.
- (2) **COMPENSATION:** Host freight railroads should be fully compensated for all costs associated with hosting passenger rail services. This includes, among other things, compensation for costs related to its consumption of rail capacity, additional infrastructure required for its operations, and the costs of planning and initiating new passenger services. When passenger rail operations use freight railroad assets and property, they must provide the host railroad with a reasonable return on its investment. Higher speeds for passenger trains and frequency of passenger trains consume more capacity and generate higher costs, which the freight host should not be compelled to subsidize. For example, operating passenger rail trains at speeds greater than existing freight or passenger operations will require significantly higher maintenance costs and enhanced track infrastructure. Passenger operators should be prepared to fully compensate the host railroad for these additional and ongoing costs.

Government policy should not skew the incentives of passenger operators and host freight railroads to negotiate efficient, mutually-beneficial agreements regarding operations, schedules, and performance goals. Passenger schedules must be realistic, reasonably achievable, and regularly updated to reflect factors such as change in operations and freight traffic mix and volumes.

- (3) **ACCESS and CAPACITY:** The use of freight rights-of-way and track by passenger rail services cannot be allowed to impair service to present or future freight rail customers, including the movement of customers' over-sized equipment. Advancing passenger rail service at the expense of freight rail would harm the public interest. When freight rail

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efficiency is impaired, freight traffic is diverted to the roads, causing congestion and increased costs that harm freight rail customers, American consumers and businesses that rely on efficient freight rail network, and, ultimately, America's competitive position in the global marketplace. It is important that the construction and funding of new rail infrastructure be sufficient to support both existing and future demands for rail freight service.

To the extent passenger rail service operates over private freight rail infrastructure, it is critical to fully preserve both the ability to operate freight trains as needed and the opportunity to expand future freight service as market conditions change. Passenger operators should work collaboratively with freight railroads and avail themselves of opportunities to improve efficiency in their own operations and resources, e.g., people, equipment, and facilities.

As America's economy grows, the need to move more freight will grow too. Recent forecasts from the Federal Highway Administration found that total U.S. freight shipments will rise from an estimated 18.1 billion tons in 2015 to 25.5 billion tons in 2040 – a 41 percent increase. As DOT has noted, “[w]ith increases in passenger traffic and freight demand, track congestion may increase, especially in higher-traffic passenger corridors. Growing congestion may reduce the reliability of the railway network for both freight and passenger movements.” Dep’t of Transp., *Beyond Traffic: Trends and Choices* 249-50 (2015), <http://1.usa.gov/1NOIWSS>; *see also* National Rail Infrastructure Capacity and Investment Study 2-3 (2007) (noting rail traffic density tripled between 1980 and 2006).

- (4) **LIABILITY:** Host railroads must continue to be protected from liability risks associated with passenger rail service. Host freight railroads need to be fully protected against any and all liability that would not have resulted but for the added presence of passenger rail service. For the freight railroads to take on any liability that arises from passenger rail operations on their lines would amount to an unwarranted subsidy of passenger rail.

As FRA and DOT move ahead with this study, the AAR and its freight railroad members look forward to continued dialogue and constructive partnership.

Sincerely



Timothy J. Stafford
*Counsel for the Association
of American Railroads*

Appendix F. American Short Line and Regional Railroad Associations Response to the Federal Railroad Administration Request for Input



American Short Line and Regional Railroad Association

September 21, 2018

Mr. Ronald Batory
Administrator
Federal Railroad Administration
US Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

Dear Mr. Batory,

I would like to thank you for the opportunity to comment on the development of a study on shared-use rail corridors. We felt best equipped to answer questions 1, 6 and 7. We believe the remaining questions could be best answered by railroads with passenger operations. Our responses are as follows:

- 1.) With the caveat raised in the footnote below, the ASLRRA believes that both short lines and Class I rail carriers will have the same basic concern when asked to share their active right of way, whether on the same track or on separate tracks, with passenger service.¹ Simply put – shared use must fully compensate the freight rail carrier from any costs or liability that would not have existed but for the presence of passenger rail service in the corridor, including disruptions during any construction phase to accommodate a new passenger rail line, adjustments needed to accommodate shared use of the same rail line, and shared operations thereafter. Adding passenger operations to a railroad right of way undoubtedly increases liability risk, labor and maintenance/capital costs, creates potential operating inefficiencies, heightens political sensitivities and neighbor relations issues, and raises the likelihood of operational disturbances (including disturbances during construction which could last for months). There are also indirect consequences and related costs, such as “on-

¹ While issue 1 appears to focus on a scenario where the freight railroad owns the rail line and is the sole provider of rail common carrier service on the corridor and, thus, negotiations for access will take place between the freight operator/owner and the passenger rail operator/user seeking shared use, it should be recognized that short line railroads can face other scenarios, particularly where they are providing freight service via a trackage rights agreement or a lease of the rail line. Under this agreement, short lines are often the sole provider of the common carrier service because the owning railroad has ceased providing service on the corridor. In other words, the owner of the railroad right-of-way and the user (i.e., the provider of service on the line) are 2 different entities. The short line may or may not be an integral part of the negotiations for shared use. To the extent the owning railroad is in control, the negotiating incentives may be very different for the owner, particularly in circumstances where the owner has backed away from providing the common carrier service. Thus, if the owning railroad is negotiating either a sale, lease or other shared use agreement where another rail operator is providing the common carrier service, the FRA should include in its study or report, a discussion of these various scenarios and a mandate that the carrier(s) providing common carrier service on the line shall be considered a full “party” to any shared use agreement.

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time” contract clauses that may be triggered by shared use or loss of business if the freight railroad finds itself unable to operate for an extended period of time due to an issue related to passenger service.

Most of the above consequences can be handled in an access agreement if all parties are obligated to negotiate with the following conditions: (1) that freight rail takes priority; (2) that the passenger operator will be fully liable for all costs (direct and indirect) assessed against or borne by the freight operator that would not have been assessed or borne but for the presence of passenger rail on the right-of-way, regardless of whether any rail negligence or other fault contributed to the costs (ASLRRA fully recognizes this is a hard pill to swallow – particularly when, over time, people tend to forget how the passenger service in question came to exist and innately believe that each party should pay for its own negligence, but it is a reasonable and necessary condition if the intent is to foster public service on private rail right-of way); and (3) that the passenger operator must: (a) provide insurance that covers this broad risk/liability and includes the freight railroad as a Named Insured, and (b) have statutory authority to raise funds if the liability ever exceeds the insurance limits and/or have a statutory cap on damages that applies to both rail and passenger operators on the line.

If these protections are not afforded by agreement or by statute, then those advocating for passenger service are asking the freight rail operator(s) to subsidize passenger service. This reality is not a negative or positive commentary on subsidized passenger service. It’s an acknowledgement that private companies should not be required to subsidize a public enterprise. Building a passenger transportation service is expensive. It is a cost government opts to incur through the democratic process to provide a service that would otherwise not be available and is rightfully paid for through public funds or fees for services provided. To the extent such subsidization is paid for by the taxpayers, private companies contribute through the taxes they pay.

Finally, in the event the FRA’s study concludes that statutory authority at the federal or state level is needed to encourage the growth of passenger rail service, the FRA should, by separate statute if necessary, assure that the requirements for protection of freight rail preeminence on the line and “but for” risk sharing preempt or preclude (as the case may be) any statute, ordinance, rule, regulation or common law to the contrary.²

- 6.) First and foremost, the FRA should do a risk analysis to determine whether shared use is or is not a risk to safety – be it the safety of rail operations or the public safety of those using passenger rail on a shared corridor. The analysis can then conclude whether such operations should be mandated in whole or in part or what minimum conditions must exist before they will be permitted. Or the analysis can conclude that such operations should exist only at the sole discretion of the freight carrier(s)

² As an aside, the FRA should explore circumstances where a freight rail operator abandons the shared rail corridor or converts it to a rail-banking scenario to protect the passenger operations on the line under circumstances where the railroad does not own the real estate on the corridor in fee simple and whether either rail-banking for passenger use is permitted and protected or, in an abandonment scenario, the state law involved will deem the passenger service to be within the scope of the right-of-way easement which would otherwise revert to adjacent owners. If this is an issue, it could certainly be corrected with appropriate legislation.

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involved who are best able to assess the cost/benefit of a shared use on any particular portion of its right of way.

If shared rail corridors are going to be encouraged as a public service that government (state or federal) deems worthy of fostering, then government needs also to provide tort reform conducive to this arrangement. At a minimum, statutory limits on liability need to be set just as they are now with Amtrak. Statutory language must make clear that these limits apply regardless of any sovereign immunity laws and are specifically intended to cap the losses for any claim involving passenger service or passenger service in conjunction with a claim against the freight carrier, whether as an entity involved in an incident or as the lessor, lessee, owner or operator pursuant to an agreement with the owner. The current limit in the Amtrak statute is \$295M (49 U.S.C. Sec. 28103). While this statute could be amended (or a new statute passed) to apply to passenger service in shared corridors, any such statute should mandate that the statutory limits must be in place at all times and coverage cannot be eroded with provisions in the statute or in an insurance policy that allow the coverage to be reduced by aggregate terms per incident, with numerous additional insureds or replenishment based on each incident that occurs over the term of the policy without replenishment of the policy. There should be a statutory cap on damages (punitive or otherwise) for any event caused by or related to the addition of passenger service to a rail freight right-of-way.

The FRA is well aware of the safety risks in a typical freight rail right of way and they probably do not need to be enumerated in great detail. Just a few examples: there may be several street crossings protected by semaphores and gates or at least crossbucks. In addition there may be pedestrian sidewalks or trails operating beside the right-of-way. Accidents can take place at these crossings or anywhere where pedestrians wander off designated walk areas (while using or in the process of using the passenger rail service or simply taking advantage of shortcuts across the rail tracks). Many of these are clearly risks that exist today with a solo freight rail operation. But the risk is somewhat measurable -- the crew members, the driver and passengers in the car, a by-stander. However, if light rail or passenger rail is installed on or adjacent to the tracks used by freight rail, the number of people at risk from a collision or other incident is larger geometrically because of the passenger service. The light rail train may have several cars and carry several hundred people. There will be an increase in by-standers waiting to catch the light rail train. Moreover, light rail/passenger rail trains typically operate at much higher speeds than freight trains, creating a riskier environment. On top of all of this are the vagaries of the litigation system in the US, and, inevitably, insurance carriers will take a much closer look at coverage requirements.

Thus, a freight railroad, that may carry only \$5, \$10 million, \$25 million of insurance coverage as a stand-alone operation, will now be subject to an entirely different scrutiny if light rail or passenger service is introduced on the same rails or in close proximity. Insurance limits for the freight railroad will inevitably increase -- despite any tort reform efforts imposed by statute -- and most certainly increase significantly without them -- regardless of the best drafted access agreements.

A passenger or light rail operator may very well carry substantial insurance coverage, even as much as is required by federal law for Amtrak service. And in all likelihood, the light rail/passenger operator will be willing to add the freight rail owner/operator

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as an additional insured on existing policies. However, courts in various states interpret the scope of coverage for “additional insureds” in different ways. Some have a restrictive view as to what coverage is provided to an additional insured. These courts argue that the “additional insured” only has coverage for damages that are caused by operations of the “named insured” (i.e., the light rail or passenger rail operator) or only to the extent the “named insured” is negligent or otherwise specifically covered under the policy. Thus, the “additional insured” may not have any insurance coverage under the passenger operator’s policy where the event was caused by the “additional insured’s” own operations. For example, in the recent case of Burlington Ins. Co. v. New York Transit Authority, (July 6, 2017), the New York Court of Appeals held the Transit Authority (an additional insured) was not entitled to coverage because it was wholly negligent and the named insured was not at fault. The court reasoned that the insurance policy was restricted to injury “caused in whole or in part” by the “acts or omissions” of the named insured and that a covered injury had to be proximately caused by the named insured. The court said the language was intended to “provide coverage for an additional insured’s vicarious or contributory negligence, and to prevent coverage for the additional insured’s sole negligence.” The court noted that the language of the endorsement replaced language that said the additional insured would be covered for damages “arising out of” the named insured’s acts or omissions. The phrase “arising out of” was described as requiring only “but for” causation.

If shared corridors are to be mandated, the freight owners and operators must be assured of full coverage in the same capacity as a Named Insured. Will there be an increased cost? Yes. Will insurance carriers still provide coverage? Unclear – which leads to the debate of whether insurance coverage must be provided by the government – federal or state – in order to foster passenger rail service.

Because obtaining sufficient insurance coverage may not be possible, may be too expensive, or, in light of the uncertainty of coverage for an additional insured, may not sufficiently cover the risks, a freight railroad must, in addition to insurance terms, require the light rail or passenger operator to contractually indemnify the freight railroad for any damages or injuries for which the freight rail operator becomes liable and are not offset by insurance payouts. The language of any access agreement must be broad but also detailed to assure any trier of fact (arbitrator or state court judge) understands clearly that the terms of the agreement were specifically meant to be broad...and it must clearly state the government operator intends to indemnify the freight railroad for the freight railroad’s own negligent acts or omissions. In some states, a public entity’s legal authority to indemnify is uncertain. A statutory authorization may suffice to cure this issue -- except, if the limits on indemnity are constitutionally based, even a specific statute authorizing indemnity may not be wholly effective and additional steps may have to be taken. But one thing is certain – simply having a statutory mandate for insurance coverage does not negate the need for enforceable indemnity clauses.

The federal statute (Amtrak) sets a limit on all claims (including claims for punitive damages) for injuries to rail passengers. There is no such federal statute governing light rail/commuter passenger claims. State law may be sufficient if a similar statute can be enacted. Certainly, if there is a federal statute addressing shared service, it can specifically eliminate or cap punitive damages.

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- 7.) Sovereign immunity (to the extent it exists in each particular state) needs to be addressed in any federal legislation proposed to encourage shared corridors. Each state has its own statutory scheme or common law on this issue and it may not be applied consistently. When a government decides to create passenger or light rail in an existing freight rail corridor rather than creating its own corridor, freight rail operators should not be left holding the bag for damages that may result, in whole or in part, from public passenger service. This is something that can easily be cured with a federal statute that assures state law sovereign immunity laws will not be applied in such a way as to leave the risks of passenger service on the shoulders of the freight carrier. There are many ways this can be done, through legislation that preempts certain state laws or through state laws that mandate insurance coverage limits, cap liability, and assure that contract terms take precedence over sovereign immunity statutes or case law.

Thank you again for your consideration and inviting our industry to participate in this initiative.

Respectfully,



Jo Strang
Senior Vice President
Safety & Regulatory Policy

Appendix G. Rail Passengers Association Response to the Federal Railroad Administration Request for Input



RAIL PASSENGERS

ASSOCIATION

1200 G St. NW, Suite 240
Washington, DC 20005

202-408-8362

September 22, 2018

Administrator Ronald Batory
Federal Railroad Administration
1200 New Jersey Ave. SE
Washington, DC 20590

Dear Administrator Batory:

Thank you for the opportunity to respond to the Federal Railroad Administration’s study of the shared-use of rights-of-way by passenger and freight rail systems, as prescribed by Section 11311 of the Fixing America’s Surface Transportation (FAST) Act. The Rail Passengers Association (RPA) is the largest and oldest rail passenger association in the nation, and the 40 million train riding-Americans we represent have a vested interest in a healthy relationship between passenger operators and host railroads. On-time performance and capacity restrictions are two of the biggest issues that face our members, and returning system fluidity and accountability to mixed-use corridors is of vital national importance if the U.S. is to achieve its stated goals of creating an energy-efficient rail alternative to overcrowded highways.

Since the passage of the FAST Act, RPA has advocated that the Federal Railroad Administration lead the way in creating a framework to engage all stakeholders—from regulators to host railroads, operators (Amtrak and non-Amtrak), shippers and passengers—to work together on how to improve dispatching, coordination and infrastructure so that all parties benefit, and the full economic potential of passenger rail can be unleashed.

Sec. 1 – Access and Use of Railroad ROW

Access Agreements – The two primary obstacles to growth of passenger rail in the U.S. are quality access to ROWs to metropolitan regions with high population density, and poor on-time performance over host railroad-owned ROWs. **Separation of passenger and freight traffic should be the primary goal wherever market demand allows.** However, there are many constraining variables. Many metropolitan areas lack sufficient population and/or density to support the creation of a separate ROW. Paradoxically, some metropolitan areas may feature too much density, making the land-takings for a greenfield ROW prohibitively expensive. Thus, creating a rationalized system for granting access to these high-value corridors, paired with a standardized dispute resolution mechanism, would be a precondition for the successful utilization of many routes.

The National Freight Advisory Committee (NFAC), created by the Moving Ahead for Progress in the 21st Century Act, advises the U.S. DOT on development of a National Freight Strategic Plan, as well as

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identifying strategies to help States implement State Freight Advisory Committees and State Freight Plans. However, while U.S. policy is consciously moving towards a more integrated transportation system, it still remains the case that the lion's share of project funding streams are directed towards various agencies lacking the authority to work on cross-jurisdictional corridors.

This lack of pan-jurisdictional funding authority comes at a critical moment for the rail industry, which is in a period of contraction. With losses in coal and crude oil rail shipments—down 44 percent and 60 percent off peak rates, respectively—railroads are looking to shed infrastructure and consolidate operations. In January 2018, CSX Transportation revealed it was reviewing 8,000 miles of rail lines as potential candidates for sale or lease as a way to create additional shareholder value. RPA expects this industry trend to continue.

This trend is amplified by technological advancements which have made it more cost-effective to move freight towards super-long consists that concentrate ton-miles along increasingly dense corridors, leading to further consolidated networks. This creates not only safety concerns, it inhibits network fluidity. Additionally, there are other disincentives to maintaining the physical corridors that provide capacity, such as taxes on improved infrastructure. Unlike the trucking industry, which uses public corridors, a freight railroad can expect to increase its tax liability through its capital investments.

One possible solution would be to create a federal grant program that would allow states and municipalities to purchase abandoned and underutilized corridors from freight railroads. We've already seen this work on the local level; CSX donated its abandoned S-line between Petersburg and North Carolina to the Commonwealth of Virginia as part of a project which will allow passenger traffic to bypass a busy CSX switching yard. Conversely, Virginia's Lynchburg/Charlottesville to Richmond was dealt a serious setback when Norfolk Southern abandoned the old Norfolk and Western mainline through Farmville and donated the ROW to the Commonwealth for a rails-to-trails project.

Having participated in the regional intercity rail studies led by the FRA over the past decade, our Association believes the FRA possesses the insight and vision to guide a grant program aimed at preserving these invaluable ROWs for rail service, further enabling passenger/freight separation and increased passenger frequencies.

Other Access Models – In a hearing before the Surface Transportation Board regarding poor on-time performance by CSX, then-CEO Hunter Harrison issued a revealing a statement on the relationship between host railroads and the NPRC: “[With regard to Amtrak]...we need to...live up to the contracts... We need to do what we say we're going to do...Now, do freight railroaders love Amtrak? No, probably not. And the groups, to some degree, clash, because it's almost designed that way. You know you're not,



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in my view, you're not going to solve the problem with Amtrak in some public-private partnership unless there's something in it for somebody."

It's worth explicitly identifying what Mr. Harrison was referencing; freight railroads are interested in long trains with infrequent schedules, and passenger railroads are interested in short trains with high frequencies at regular intervals. These systemic conflicts will not go away.

However, there are a number of innovative models that have been proposed that can decrease these frictions. Some academics have attempted to flesh out a model for better asymmetrical negotiations. In "Integrated Modeling of High Performance Passenger and Freight Train Operation Planning on Shared Use Rail Corridors: A Focus on the US Context," [Ahmadreza Talebian and Bo Zou](#) have introduced a novel approach to access negotiations by introducing an analytical model that incorporates considerations of passenger schedule delay and freight foregone demand as a function of train schedules, while identifying capacity shares and associated charges on shared-use rail corridors in the U.S. Talebian and Zou envision a two-level negotiation model, with an upper-level schedule bargaining game and lower-level price bargaining game, to create a more complete array of information for the bargaining entities. It is important to note that this model results in increased net payments from passenger railroads—certainly higher than Amtrak's current per-mile access costs—but that the rate of increase is less than proportional to increase in frequencies.

Additionally, it is useful to separate individual access agreements from broader corridor development strategies. In "Passenger Trains on Freight Railroads: A View from Both Sides of the Track," former Amtrak President Paul Reistrup surmised "[the] public designation of high-speed corridors most frequently create expectations that cannot be satisfied because of [a] lack of capital," suggesting that multi-billion dollar project estimations undercut the power of public-side negotiators to achieve cost-effective access agreements. A Railroad Enhancement Fund with a dedicated revenue source and an ongoing mandate to continually improve passenger rail networks on a continuing basis.

Dispute Resolution – Over the past ten years, passengers have suffered due to a dramatic rise in host railroad interference and passenger delays. Given that the instances of freight interference vary significantly across railroads—even when controlling for disparate operating environments—Rail Passengers believes much of this interference comes down to corporate decision-making.

Central to the problem of on-time performance (OTP) is the black-box nature of U.S. rail dispatching, which in turn results from the fragmented nature of the U.S. rail network. This problem is most pronounced in Chicago, which for historical development reasons is the convergence point for all six Class I railroads. The city accounts for 900 miles of track, 25 intermodal yards, and 1,300 trains per day. Yet despite sharing an environment that is interconnected at critical points, not just with passenger

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operations (intercity and commuter) but other freight operations, each railroad runs their own dispatching center. This results in a non-optimized operational environment with each railroad in competition with other freight and passenger operators.

In a hearing before the Surface Transportation Board regarding poor on-time performance by CSX, then-CEO Hunter Harrison suggested that the optimal solution for Chicago's congested infrastructure would be a **central dispatching authority**. While the institutional obstacles to implementing this kind of centralized dispatching authority would be great, Rail Passengers believes the idea is too compelling not to investigate. Indeed, it would replicate best dispatching practices in the aviation industry, which has proven more efficient and adaptive to responding to surges in consumer demand and traffic growth than the rail industry.

Additionally, our Association is asking Congress to grant Amtrak a **Private Right of Action** to enforce dispatching preference as described in Amtrak's Fiscal 2019 Grant Request. Current law requires that enforcement be initiated through civil action by the U.S. Department of Justice (DOJ) before a District Court judge. The DOJ has exercised this privilege one time in Amtrak's forty-plus year history. Granting Amtrak a private right of action to enforce its statutorily granted preference would merely be giving it the same legal recourse as any other company if its rights were being violated.

In addition to Private Right of Action, Rail Passengers supports legislation that shifts creation of **Metrics and Standards**—as described in Section 207 of the **Passenger Rail Investment and Improvement Act of 2008 (PRIIA)** (Division B of Pub. L. 110-432)—to the **Surface Transportation Board**. This will streamline regulatory oversight and reinvigorate meaningful passenger protections as originally envisioned by Congress.

Sec. 2 – Effectiveness of Existing Contractual, Statutory and Regulatory Mechanisms

As referenced above, many available mechanisms for addressing poor passenger rail performance have been lightly used or ignored, from the Justice Dept.'s apparent unwillingness to pursue enforcement actions on behalf of Amtrak to the seemingly endless litigation surrounding dispatching preference and its relation to OTP. These realities diminish the effectiveness of the tools already in place.

The most important example is the **preference clause**, found in **49 U.S.C. § 24308(C)**, was originally written so that host railroads – rescued by taxpayers in 1970 when Amtrak was created to relieve the host railroads of having to run passenger trains – had to give passenger trains preference unless they could win an exemption by proving that preference for passenger trains would “materially lessen the quality of transportation provided to freight shippers.”

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It is useful here to quote the entire relevant section:

Preference Over Freight Transportation - Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the STB orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the STB for relief. If the STB, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the STB shall establish the rights of the carrier and Amtrak on reasonable terms.

This clause, along with the mechanisms outlined in **PRRRA Section 213**, should be an effective mechanism for ensuring that passengers and taxpayers alike get what they've paid for. But lax enforcement and the continuing litigation over PRRRA language have combined to leave on-time performance at absurdly low levels. Our Association recently argued in federal court that Section 213's standards are correct and should survive legal challenges. The Trump Administration, through the Office of the Solicitor General, concurred earlier this year despite declining to recommend that the Supreme Court take up the issue at this time:

The government agrees with petitioners that Section 213, properly construed, authorizes the STB to develop a standard through rulemaking for "on-time performance" as one of two statutory triggers under 49 U.S.C. § 24308(f)(1). As petitioners explain (17-699 Pet. 20), that construction of Section 213 is most consistent with "PRRRA's text, structure and purposes." See 17-699 Pet. 20-31; 17-714 Pet. 10-12. The Eighth Circuit's decision to invalidate the STB's final rule based on a contrary reading of Section 213 was erroneous. That decision, in combination with the DC Circuit's decision striking down on constitutional grounds the metrics and standards established under Section 207, leaves a significant gap in the scheme Congress created by enacting PRRRA, thereby threatening the quality of passenger rail service nationwide. See 17-699 Pet. 15-18.

Our Association also continues to believe that **All-Stations OTP (AS-OTP)** remains the correct standard for establishing and measuring train performance. Any regulatory regime proposed as a result of this study must measure on-time performance at all stations, must use a single 15-minute standard at each point along a train's route, and must trigger an automatic investigation if trains on a given route dip below the OTP standard more than 20% of the time.

Proposals previously advanced that would ignore OTP at intermediate stations would permanently hobble Amtrak or regulators from taking action on behalf of the 65% of Amtrak passengers in 24 states who get on and off at an intermediate station. Endpoint OTP standards are wholly inadequate, given that some 90% of Amtrak stations' OTP would never be measured under such a standard. Three out of

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every four passengers using Amtrak's trains depart from and arrive at stations strung between end point cities, and never set foot in an end point station. The percent of passengers traveling between intermediate points exceeds 50% on three-fourths of Amtrak's 47 routes. Intermediate stations' ridership is an important statistic throughout the system, and is significant on short, medium and long distance routes.

Sec. 3 – Strengths, Weaknesses, And Possible Approaches To Address Weaknesses

Many of the strengths and weaknesses have already been identified in previous sections of this document. Rail Passengers would, however, like to highlight additional approaches to addressing the weaknesses in how we look today at OTP.

The Rail Passengers Association also believes collected and published data should measure the effect of degraded OTP on connections, and should require statistical reporting by Amtrak detailing when late trains cause passengers to miss connections or when Amtrak is forced to delay departure of trains for connecting passengers.

Collected and published data should also include OTP at key "chokepoints" where passenger trains are handed off from one host railroad to another. Passengers who use more than one route to complete a trip represent a significant portion of Amtrak's business. In FY 2015, for example, 2.3 million passengers generating more than \$220 million in revenue made connections between trains.

When trains arrive at transfer stations many hours late it can lead to either of two unacceptable outcomes. The connecting train departs late because it waits for the connecting passengers, or the passengers miss the connection and, in cases where there is only one departure a day, arrive at their final destination as much as 24 hours after they had planned.

There are all sorts of consequences from these scenarios, most of which have economic or safety dimensions that can be measured and analyzed. Hotel rooms are cancelled and deposits forfeited, or extra expense is imposed on the traveler. Arrivals that had been scheduled for daylight hours can instead transform into dangerous night-time arrivals at thinly staffed or unstaffed stations; this can be especially troublesome for elderly or disabled travelers, posing a real safety risk which is magnified by these vulnerable populations' outsize reliance on trains as their only practical means of long-distance travel.

Any new regulatory regime should measure and consider these very real consequences of seriously late trains, creating additional metrics that track not just the percentage of trains that meet the schedule adherence standard but also the amount of delay in minutes and how that delay disrupted connections.



Sec. 4 – Mechanisms for Measuring and Maintaining Public Benefits

The FRA's role significantly changed with the task of administering the distribution of American Recovery and Reinvestment Act passenger rail grants (ARRA) in 2010. As a majority of the ARRA-funded rail improvement projects would be expended on privately-owned, shared-use ROWs, the agency recognized the need to develop a formal process to ensure that the impending public investment would result in both immediate and ongoing public benefits. The FRA's answer was the Service Outcome Agreement (SOA), which strived to establish specific performance standards for the passenger services which would benefit from the public investments (number of passenger train track access 'slots'; passenger train on time performance criteria, etc.).

The imposition of such standards and the requirement to enter into formal legal agreements with the FRA were largely new for the private-sector freight railroads, which have historically resisted efforts to control or regulate their businesses. The SOAs included penalties for host freight carriers that failed to abide by the terms of these agreements, up to requiring the host carriers to reimburse the federal government for the public investments made on their properties.

During the initial development of the SOAs the freight rail industry as a whole objected to the process, leading to significant delays in the expenditure of the improvement funds. In the case of the ARRA funds awarded to New York State for passenger-related improvements along Amtrak's Empire Corridor, the resulting impasse and delay between CSX and the State ultimately was resolved only after Amtrak agreed to enter into a State-brokered long-term lease of 89 route-miles of the corridor, obviating much of the need for the agreement in the first place.

In the future, revised and alternative mechanisms should be developed collaboratively between the sources of public investment funding on shared-use corridors and the private owners of these corridors. Metrics should include the current and reasonable future needs of the freight host railroads to control their own operations, while recognizing the importance and desirability of improved passenger rail transportation. Such metrics could then be factored into the planning and cost estimation of future shared-use corridor improvement projects.

Furthermore, outside of binding contracts, measuring State investment in such improvements shouldn't be confined simply to passenger train performance. There is good data to suggest that investments in passenger rail improvements not only shift travel from other modes, primarily the nation's highways, but sufficiently attractive frequencies and arrival/departure times can stimulate additional trips that might not otherwise have been taken. These trips not only generate revenue to the operating carrier but incrementally increase income and economic benefits at destinations, as passengers spend money at local hotels, restaurants, retail establishments and attractions. And this need not be limited to tourism;





sales tax revenues have increased in cities large and small around the U.S. within a quarter mile of new transit service, as retail traffic drives up receipts.

When assessing the value of investing in improvements, RPA advocates for an economic benefits model that considers not only the direct benefits to freight and passenger rail operators, but the additional economic activity that results, ranging from increased tourism to real-estate development. Value-capture formulas that describe the entire range of new economic activity stemming from these investments would offer a truer picture of the return-on-investment for improvements directed toward shared-use right-of-way. There is also inherent value in the enrichment of land surrounding a given right of way in the case of new stations and passenger service as well reduced overall transportation costs to a given state or municipality that should be made clear to public sector stakeholders, ideally in an annual index.

Sec. 5 – Approaches to Operations, Capacity, and Cost Estimation

Almost all US passenger rail service and expansions depend on a public entity negotiating with a private sector host railroad; in the current framework it is unfortunate that proprietary interests and transparent decision making are effectively at odds with each other. Host railroads are in a strong position to demand a high price for accommodating passenger service with limited justification.

Along the coast of the Gulf of Mexico, service between Jacksonville, Florida and New Orleans, Louisiana has been suspended since Hurricane Katrina in 2005. It took over a decade to build a constituency of political support that crossed state lines, as well as to bring Amtrak and host railroad CSX in to the process to plan in earnest to bring back a missing link in the nation's interstate passenger rail system. The FRA's own analysis identified \$117.67 million in capital improvements needed to upgrade the line sufficiently to accommodate reintroduction of service along the line (absent PTC installation costs, which could significantly increase that estimate). However, CSX Railroad's study with its consultants concluded that improvements for a single daily passenger train would come at a cost of \$2.3 billion, increasing the FRA's estimate almost 20 times over. The assumptions, methodology, and data used in CSX's own assessment were never fully shared with the stakeholders involved in the project.

While the option to bring the issue to the STB for mitigation remains, this disparity illustrates a process that is by definition opaque, and not transparent. This should come as little surprise, given an economic environment that discourages capital investment in railroad ROWs thanks to pressure from activist railroad shareholders, and a perverse taxation of railroad ROWs concurrent with substantial and ongoing highway subsidies.



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Learning from Aviation - DOT for decades has already developed and refined a working model to a high level of maturity for addressing precisely this kind of requirement in another travel mode: airlines. The type of information gathered in Form 41 financial filings and T100 market data filings is ideal for developing an informed picture of the state of America's air-transportation enterprise. The combined datasets that result from these two data-gathering processes generate monthly, quarterly and annual metrics that can help professionals and the traveling public understand everything from the financial health of individual operators to travel demand for city pairs, shifts in demand patterns over time, and consumer-focused metrics such as delays and cancellations. Existing FRA datasets do a reasonably good job of capturing commodity shipments, for example, but lack the depth and consistency that a Form 41/T100 approach could produce.

Mechanisms have been matured at FAA for gathering and presenting this data in ways that allow meaningful analysis while preserving proprietary protections for individual operators. In rail operations, new metrics could be derived from better data collection and more complete fact gathering. These could, and should, inform public policy.

As just one small example, RPA believes that by gathering and publishing such data, FRA could beneficially help to set not only a minimum on-time performance standard, but a data-driven target for exceeding minimum standards that could offer significant financial incentives to host railroads that not only deliver superior OTP but reduced trip times and greater frequencies. This could perhaps take the form of bonus payments that rise on a scale calibrated to OTP achievements, incentivizing private investments in a rail network that can serve not only freight customers but passenger trains at the high service levels a robust national infrastructure demands.

Another way such publicly available and standardized data could be useful is in assessing the source of delays and lack of fluidity on the nation's rail network. RPA believes that while Amtrak-caused delays contribute only a very small fraction of the total delays reported, it is only fair to use an OTP rulemaking process informed by robust public data collection to establish a minimum standard Amtrak must meet to avoid delays caused by equipment failures.

When Amtrak experiences an equipment failure en route, it adversely affects both its passengers and the host railroad's operations, sometimes in significant ways. Congress has put significant pressure on Amtrak to cut operating expenses, and this pressure creates significant incentives for Amtrak to defer maintenance, deploying equipment that is not in a state of good repair and subject to en route failures. To the extent that the relatively small fraction of delays is caused by Amtrak equipment problems, it can often be viewed as a federal policy failure as much an operational failure on the part of the railroad.





This failure reveals what happens when Congress mandates performance by the national operator while systematically starving that same operator of the resources it needs to ensure that the equipment performance does not adversely affect host railroads. Regulators should be aware of this issue and its importance both to passengers and to the railroads over which Amtrak trains operate. A systematic, transparent and detailed data-collection regime that mirrors the statistics now gathered and reported in air travel could lead to more nuanced regulatory approaches to addressing the multiple root causes of persistent delays. With more reliable information as to the costs and benefits of such investment, additional agreements could be more easily made creating an influx of public investment into the national rail system, easing more than just passenger bottlenecks.

Sec. 6 – Liability

In general, liability caps exist to protect necessary public services from the prohibitive cost of high insurance premiums which could threaten the financial model upon which these public agencies operate. The House Transportation and Infrastructure Committee stated as much in 1997, writing “in general, the rationale for imposing limitations on liability in public transportation is to encourage certain activities that yield substantial social benefits that otherwise would not be undertaken due to the exposure to liability, and to protect the taxpayers who ultimately bear the costs of tort liability incurred in providing the public transportation.”

Liability Caps – While the post-accident needs of victims cannot be ignored, it is essential that they always be balanced with the viability of these essential transportation services. With 40,000-plus highway deaths, national safety priorities demand shifting more passenger-miles onto rail. With this in mind, RPA believes that—based on analysis of the civil outcomes following recent catastrophic derailments—the \$294 million cap created by the FAST Act in 2016 (to be readjusted every five years according to inflation) does not need to be increased. With the imminent introduction of Positive Train Control technology, we believe it may even be appropriate for a federally-led study to analyze the appropriateness of reducing that cap once the PTC system is in place and fully operational.

Models – Given the desirability of introducing higher levels of competition into the passenger train operating market, and the limited marketplace that currently exists, RPA argues that the federal government has a larger role to play in insurance provision for rail operators. One such role would be mandated contributions to a captive insurance pool overseen by the federal government, designed to pay excess claims on a no-fault basis, with minimum insurance requirements attuned to size and budget. Another approach would be for the government to act as direct insurer offering subsidized premium, similar to what is seen in the National Flood Insurance Program. Finally, lawmakers could lower the liability cap to a market-friendly level and provide a federal backstop for insurers, such as with the Terrorism Risk Insurance Program.



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Rail Passengers is also looking to the recent successes of private passenger railroads such as All Aboard Florida and Texas Central Partners, analyzing ways in which they might be scalable. As such, our Association will be launching an analysis of these systems once operations have matured to determine best practices in private sector liability compliance; we would welcome FRA participation in this analysis.

Sec. 7 – Sovereign Immunity by a State

RPA primarily views the question of the state sovereign immunity as immaterial to liability as regards the operation of state-sponsored passenger rail services. The precedent for viewing them as entangled seems to flow from a decision made by previous FRA administrators, which—on two separate occasions in North Carolina and Indiana—stated that FRA viewed the state as the principal entity of record for purposes of ensuring compliance with Federal railroad safety requirements.

North Carolina successfully fought this decision in court. In Indiana’s case, Karl Browning, then commissioner of the Indiana Department of Transportation, issued the following response: “Our position is there is a distinction between contracting for railroad services and providing train service. INDOT cannot agree to become a railroad or a railroad carrier as that would require a significantly higher commitment of resources, the assumption of additional liability, and uncertainty over employment practices.” INDOT went on to argue: “This burdensome interpretation exposes states to significant increases in cost, paperwork and liability, including (1) Liability for the actions of passenger rail providers up to \$200 million for each occurrence of injury, death or property damage, (2) Hiring new staff to monitor plans and programs in compliance with federal rules, and (3) Interpretation that state employees are rail employees, subject to retirement and employer liability rules and limits.”

A plain reading of Mr. Browning’s statement shows that the disincentive structure he describes the FRA creating to be correct. Since it is clearly the case that the FRA should not be in the business of discouraging states from growing state-supported passenger rail service, our Association argues this interpretation should be abandoned, with suitable contractors and subcontractors acting as principal entity of record for purposes of ensuring liability compliance. To the extent that there is concern over the ability of smaller entities to achieve compliance with liability requirements, the FRA should address this issue directly through on of the strategies RPA identifies in Sec. 6.

Thank you for your attention and consideration to our submission.

Sincerely,

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Jim Mathews, President & CEO
Rail Passengers Association



Appendix H. San Joaquin Regional Rail Commission Response to the Federal Railroad Administration Request for Input



**SAN JOAQUIN
REGIONAL
RAIL COMMISSION**

Chair, **Steve Dresser**, City of Lathrop
Vice Chair, **Christina Fugazi**, City of Stockton
Commissioner, **Bob Johnson**, City of Lodi
Commissioner, **Debby Moorhead**, City of Manteca

Executive Director, **Stacey Mortensen**

Commissioner, **Bob Elliot**, San Joaquin County
Commissioner, **Leo Zuber**, City of Ripon
Commissioner, **Scott Haggarty**, Alameda County
Commissioner, **John Marchand**, City of Livermore

Oct 5, 2018
Frances Bourne
National Rail Planning Division
Federal Railroad Administration
1200 New Jersey Ave SE
Washington, DC 20590

RE: Input for a Study on Shared-Use Rail Corridors Required by Section 11311 of the Fixing America's Surface Transportation Act (FAST Act)

Background on Altamont Corridor Express (ACE):

Altamont Corridor Express is a regional rail service in Northern CA and is not able to utilize the Federal statutes for track access that the intercity services are allowed through Amtrak as their operator. The ACE trains operate 81 miles on Union Pacific (UPRR) track and 5 miles on Caltrain track. ACE has a 10-year Trackage Rights Agreement (TRA) with UPRR, which is renegotiated at the end of every term, and a TRA with Caltrain renegotiated every three years.

Responses to questions applicable to the ACE Service:

(1) Access and use of railroad right-of-way by a rail carrier that does not own the right-of way, including access agreements, access costs, and dispute resolution;

- The TRA with UPRR includes:
 - Per-train mile fees
 - Capital access fee paid annually on a per roundtrip basis
 - Capitalized maintenance paid annually on a per roundtrip basis

The costs for the items listed above are negotiated as part of the TRA renewal and amendment process.

One difficulty of this negotiation process is the host railroad expectation that upon completion of negotiations, any increased costs for access will be funded immediately. Government budgeting processes don't allow for this and SJRRC has been in a position of requesting that UPRR defers implementation of the new costs until they can be budgeted in the annual process. It is also difficult to negotiate costs downward because the host railroad can terminate the access rights if their terms are not met.

- Arbitration:
The ACE/UPRR TRA designates the Commercial Arbitration Rules of the American Arbitration Association for disputes. The section states, "the decision of the arbitration panel shall be final and binding upon the parties in accordance with the laws of California."



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(2) Effectiveness of existing contractual, statutory, and regulatory mechanisms for establishing, measuring, and enforcing train performance standards, including how delays are recorded and assigned, and the use of incentives/penalties;

- The ACE/UPRR TRA requires UPRR to operate the ACE trains at 95% On Time Performance (OTP), which is defined as arriving at the final station within 5 minutes of the scheduled arrival time. If the 95% OTP is not achieved for a calendar month due to UPRR dispatching errors, ACE shall have absolute priority for a continuous month over UPRR double-stack trains. ACE has no financial incentives or penalties for the Railroad for on-time performance, however, ACE trains have operated near or over 90% for the 20 years of service.

The few times there have been OTP issues, it has been difficult to hold UPRR to the agreed upon remedy, as there are no other penalties associated with noncompliance, except arbitration.

- Delays are recorded by ACE train crews and Agency staff and forwarded to the Host RR on a daily basis for concurrence. If there is a disagreement on a delay as recorded, the Host RR will respond with the cause and the delay will be discussed between the parties. This process engages the Host RR and makes them aware of dispatching decisions being made at the Dispatcher and Corridor Manager levels which allows for modification of protocols as required.

(3) Strengths and weaknesses of the existing mechanisms under (2) and possible approaches to address the weaknesses;

- A weakness with the current mechanism is that there is no penalty when the host railroad does not follow the TRA, and arbitration can take considerable time, while the passengers suffer with unreliable service.
- The experience of the Rail Commission has been that long-term partnering with the host railroad on these issues has led to better performance than other systems with stronger statutory penalties.
- A possible approach to improving On-Time Performance is to have all passenger rail services adopt the same incentive and/or penalty program paid for from a single funding source.

(4) Mechanisms for measuring and maintaining public benefits resulting from publicly funded freight or passenger rail improvements, including improvements directed towards shared-use right-of-way by passenger and freight rail;

- On-Time Performance
- Service Reliability
- Increased speeds
- Reduced scheduled run times
- Improved ride quality

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(5) Approaches to operations, capacity, and cost estimation modeling that allow for transparent decision making and protect the proprietary interests of all parties;

- ACE staff have an operations monitoring center with host railroad CAD screens where the Dispatcher moves can be monitored. This allows ACE staff to have an open dialogue with the Host Railroad on adverse decisions made and how to prevent delays in the future. The screens show the larger host railroad territory and allows ACE staff a better understanding of Dispatcher responsibility and network issues that affect the ACE territory.
- Transparent modelling of the available rail network capacity is difficult given the confidential nature of the host railroad freight movements. Additionally, the freight growth projections of the railroads tend to be aggressive and can result in investments for passenger rail agencies that may not correlate with the actual impacts to freight movement. Non-Disclosure Agreements may be an avenue to understanding the nature of freight movement over a corridor. However, railroads are so fluid that any changes in customers or routes can cause modifications to operating plans, train sizes and prioritization for movement of goods.

(6) Liability requirements and arrangements, including whether: to expand statutory liability limits to other parties; to revise current statutory liability limits; to establish alternative insurance models (including models administered by the Federal Government); and current insurance levels of passenger rail operators are adequate and whether to establish minimum insurance requirements for such passenger operators;

- The recent increase in statutory liability limits to \$295M has had some positive benefits in terms of limiting payouts for catastrophic events, but has given the perception of a "deeper pocket" for less significant incidents. Additionally, every operator pays more for the insurance, regardless safety record, because the host railroads require passenger operators to match the statutory liability levels.
- An evaluation of pooled insurance may be warranted and could allow costs to be spread over a larger number of entities.

(7) Effect on rail passenger services, operations, liability limits, and insurance levels of the assertion of sovereign immunity by a State.

- This is a state related issue and does not apply to the ACE Service.

Thank you for the opportunity to help inform the development of the Shared Use Study. If you have any follow-up questions, please contact Brian Schmidt (209) 649-6403.

Sincerely,



STACEY MORTENSEN
Executive Director