

TESTIMONY OF

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AUTHORITY**

BEFORE THE

**HOUSE COMMITTEE ON TRANSPORTATION AND
INFRASTRUCTURE**

**ON “Competitive Contracting in Commuter Rail
Operations”**

September 11, 2012

INTRODUCTION

Chairman Mica, Ranking Member Rahall and members of the House Committee on Transportation and Infrastructure, I thank you for the opportunity to testify today to discuss the important issue of competitive contracting in commuter rail operations and our experience at the South Florida Regional Transportation Authority or SFRTA over the past 26 years.

First let me emphasize that passenger safety is the number one priority on all our nation's commuter railroads and it is my opinion that competitive contracting of commuter rail services has not in any way diminished the safe provision of services by Tri-Rail, SFRTA's commuter rail service. In fact, it enhances safety. Each contract operator knows that if it doesn't keep safety its number one priority, it can be replaced. As the Executive Director of Tri-Rail, I can assure the committee that we intend to continue to employ contracted operators and we are confident that we can fulfill our number one commitment to our passengers - that every day we offer the highest degree of safety in the provision of our services. I know the Committee has many questions about SFRTA's experience with contracted commuter rail services in South Florida and I will try to address the key points that I believe will offer the Committee the most valuable information. I will also be happy to provide additional information beyond my written and oral testimony.

I also want to emphasize that while the Congress has not previously intervened in the state and local review of various contracting options offered by Amtrak and other private operators in the railroad industry, I along with my fellow CEOs in the Commuter Rail industry were very concerned earlier this summer with provisions contained in the Senate Commerce Committee's Rail Title of S. 1813 during the consideration and development of MAP-21. These provisions would have required contract operators to carry liability insurance coverages and obtain federal certification for operating in the US. I along with my fellow CEOs in the commuter rail industry were very concerned when these provisions were proposed. These requirements would have represented major obstacles to the limited number of enterprises offering contracted commuter rail services and would provide no recognizable additional benefits. In fact, I believe that these provisions, if passed, would have added only significant new costs to commuter rail agencies such as Tri-Rail, making the service we offer less attractive to our customers and possibly have negatively impacted competition for these services.

If there is a bottom line message in my testimony today, it is that the process for selecting and overseeing contracted operations and maintenance services for commuter rail services employed by commuter rail agencies such as Tri-Rail has become a very sophisticated and rigorous process that assures only qualified entities are able to compete for these services. And further, I am totally confident that contracted operators can and do meet the rigorous safety standards for operations set by the industry and enforced by the Federal Railroad Administration.

Additionally, it is important that Congress fully examine the impacts of any action that places additional restrictions on who can participate in the process, such as the introduction of any

certification requirements for contract operators, or the requirement for contract operators to obtain liability insurance coverage, or increase the limits for existing liability coverages. Any actions along the lines of what was proposed in the US Senate earlier this year, would have significant cost implications for Tri-Rail and other commuter rail agencies across the nation, while producing no measurable contribution to safety of our operations.

ABOUT TRI-RAIL

Tri-Rail is the commuter rail line linking Miami, Fort Lauderdale, and West Palm Beach. Tri-Rail is operated by the South Florida Regional Transportation Authority ("SFRTA"). The 72-mile-long system has 18 stations along the Southeast Florida coast. The system shares several stations with Amtrak along the same corridor and both Tri-Rail and Amtrak connect to the Miami Metrorail at Hialeah (Miami). Tri-Rail will soon also provide service to the Miami Intermodal Center where the airport, bus, and rail systems will all be connected at one location.

Planning for the system began in 1983, and building the organization began in 1986. The current system was formed by the Florida Department of Transportation and began operation in 1989, originally to provide mitigation while construction was underway to widen Interstate 95 and the parallel Florida Turnpike. It was the first new commuter rail operation in this country in 25 years. The success of Tri-Rail since its inception led to its permanent status and expansions of service. Tri-Rail provides intermodal connections to all three South Florida international airports: Miami International Airport, Fort Lauderdale – Hollywood International Airport, and Palm Beach International Airport.

In 1998, the initial 67-mile-long route was extended north from the West Palm Beach Station to the Mangonia Park Station, and south from Hialeah Market Station (formerly Miami Airport Station) to the new Miami Airport station. Construction of the extensions began in 1996, which added nearly 4 miles to the system. In the early 2000s, Tri-Rail received \$84.8 million in federal New Starts funds for double tracking, building extensions and improving stations, not to mention expanding service to 20 minute headways during the rush hour.

In 2007, a project to upgrade the full length of the line from Mangonia Park to Miami Airport with double track was completed with the opening of a high-level fixed bridge over the New River near Fort Lauderdale.

All stations other than Pompano Beach were remodeled to include new elevators and pedestrian bridges over the tracks, large roofs over the platforms, and better facilities. In 2011, SFRTA received a \$5.7 million federal grant to replace the dilapidated Pompano Beach station with a "green station," generating more than 100% of its energy through solar power. Construction is expected to take 18 months to complete, with the station to remain open during construction.

COMPETITIVE CONTRACTING

Background of Agreements. SFRTA has used private contract operators since the inception of service in 1989. The original Train Operations & Maintenance agreement was with a firm, Urban Transportation Development Corporation ("UTDC"), now a division of Bombardier Transportation (since 1991). The term for that agreement expired in January 1994.

SFRTA undertook a competitive procurement and after receiving bids from Amtrak, a joint venture of Morrison-Knudsen, Inc. and the Burlington Northern Railway, and Herzog Transit Services, the Board selected Herzog Transit Services to provide Train Operations & Maintenance under an agreement from January 1994 to January 1998.

Herzog Transit Services was again selected to provide Train Operations & Maintenance under an agreement that began in January 1998 and concluded October 2002. In November 2002, Herzog Transit Services was again renewed following a competitive procurement to provide Train Operations & Maintenance under an agreement that spanned until June 2007. Of note was a proposal received from a new proposer, Florida Transit Services, a joint venture comprised of Connex and Bombardier.

Prior to the expiration of this agreement, the SFRTA Board elected to split the Train Operations & Maintenance into two separate contracts. Veolia Transportation submitted a proposal and was selected to provide Train Operations under an agreement commencing in July 2007, while Bombardier Mass Transit was selected as the successful contractor for the Fleet Maintenance agreement that also began in July 2007. Both agreements expire on 6/30/14. Other bidders for the Train Operations procurement included Amtrak for train operations and Talgo, Inc. for fleet maintenance.

Most Recent Procurement. The decision to split the Train Operations and Maintenance services into two separate contracts was made to insure multiple contractors would bid on the contract and the agency could use the market to set a competitive price for the Operation. At the time the contracts were let, there were few companies that could offer both disciplines and that limitation could have led to cost increases. SFRTA received very competitive bids on both the Train Operations and the Maintenance contracts. The Train Operations contract term is for 7 years with one 3 year option, which we are currently evaluating. Over the past 6 years, we have seen an increase in the number of contractors providing these services and the ability of these contractors to provide both disciplines. We are now evaluating whether it is a better time in the market to combine these services and realize the economies of scale from including multiple services under one agreement.

Lessons Learned from Competitive Procurements

The SFRTA Board has seen that the market has changed over the past 20 plus years. The Agency has been very successful recognizing new trends and seizing opportunities to tailor the procurements to maximize competition and save taxpayer dollars by getting the best prices from a robust competition. The ability for SFRTA to make its best decision based on the market

has yielded successful results. This has been true for not only its Train Operations and Maintenance services but also for Security, Station Maintenance and Bus Services as well. Over 80% of SFRTA's total operation is under contract for services and all are competitively bid. In addition, over 97 % of our capital projects are competitively bid and performed by private contractors. SFRTA has also won multiple state and federal awards in recognition of its procurement practices. This ability to seek the best services at the most competitive costs must be maintained so that we can continue to provide these services in constrained fiscal times.

It is important to note that SFRTA currently contracts with Amtrak and CSX Transportation for the dispatch of the Tri-Rail service corridor. These agreements are not competitively procured, due to the inability of other parties to dispatch the corridor.

LAWSUIT CHILLS MARKETPLACE

Amtrak recently sued Veolia in federal court in Washington D.C. on the grounds that Veolia had, by including names of then-Amtrak employees in its proposal, aided those employees in a breach of their fiduciary duty to their employer (Amtrak) and as such, should pay damages in the amount of lost profits to Amtrak. This lawsuit will likely create significant challenges for commuter rail agencies such as Tri-Rail. It is my opinion that, although there were no damages awarded to Amtrak, the mere fact that a contract operator was sued by a competitor for approaching the other party's employees for possible inclusion in their proposal submission to be presented as a part of a proposed management team, will chill the marketplace and lead to a great hesitancy by contractors to approach the very limited pool of railroad talent.

The result will be that agencies such as SFRTA may be presented with proposals that do not provide specific details of a proposed management team, because the proposer is too intimidated to approach management level employees of another firm, or the agency is not offered the best team because the proposers are limited to their current employees. Prior to this claim filed by Amtrak against Veolia, a collegial atmosphere appeared to exist that allowed proposers to discuss possible future employment with other individuals in the industry when submitting a proposal.

The ability to include potential employees in proposals has been a critical feature of the process of responding to Operations and other procurements due to the relatively limited talent pool of railroad managers with the experience and expertise required for this type of service. It has been a normal practice, not only in the commuter rail industry, but also in the transit contracted operations industry as a whole, to be able to freely approach employees of other firms to discuss possible employment options when preparing proposal teams.

Of course it is important that employees do not in any way violate their obligations to their current employer or any of the requirements of their positions with that employer. But, the process of talking with current employees of other potential contractors was perceived in the industry as a normal practice. I believe this lawsuit, and the costs associated with it, will force

potential proposers to be much more circumspect in their management team submissions. It will chill competition, and that is not a positive development for our industry.

LIABILITY COVERAGES/LIMITS AND CERTIFICATION OF CONTRACTORS

During consideration of the surface transportation programs, the Senate Committee on Commerce passed a Rail Title under S. 1813 that included provisions that would have amended 49 U.S.C. §10901 to establish new certification requirements for passenger rail operators (presumably other than Amtrak), including a requirement for minimum liability coverage of \$200,000,000 per incident for such operators. This proposed requirement under proposed §35601 once again brought to the fore the issue of liability coverage for commuter rail operations other than those provided by Amtrak.

Liability coverage is a significant cost item for commuter rail agencies, whether proposed, new, or established. Putting aside the question of whether the new coverages envisioned in S. 1813 could even be procured at these levels in what has become a foreign dominated insurance marketplace, there is also a fair amount of uncertainty surrounding the interpretation of the existing statutory cap and related provisions vis-à-vis non-Amtrak commuter rail operations that undermines commuter rail agencies' ability to negotiate reasonable passenger rail liability agreements both with freight railroads that own or share passenger corridors and with third parties that operate the agencies' trains.

Merely establishing a new minimum coverage requirement for non-Amtrak commuter rail operations without explicitly clarifying the status of limitation of liability for such operations would not only fail to address the uncertainty, but would exacerbate current difficulties in negotiating necessary liability agreements and securing affordable insurance.¹ In fact, proposed §35601 arguably would make liability difficulties for commuter rail agencies worse than under current law. This would occur first, because the provision would have added a new requirement for liability coverage for passenger rail but did not confirm the applicability of the existing statutory liability cap for passenger rail. As such, the provision could be construed as demonstrating Congressional intent that the existing liability cap under 49 U.S.C. §28103 does not apply to commuter rail. This is clearly not the way the statute reads, but the proposed section 35601, by omitting any confirmation of Congress's intent, would have clouded the issue. Second, the provision conflicts with some state laws on the limitation of liability, possibly increasing confusion about the appropriate levels of liability coverage for commuter rail and disrupting states' carefully articulated public policy as to sovereign immunity.

As to the latter point, it should be noted that Amtrak, a national carrier, is not similarly situated to local commuter rail providers in this regard because all of its requirements for liability coverage and other insurance coverage are addressed through federal mandates; this places Amtrak in a unique posture with respect to both issues.

¹ See APTA letter to conferees, which opposes §35601.

http://www.apta.com/gap/letters/2012/Documents/120509_conferees_s1813andhr4348.pdf.

Commuter rail carriers do not have the rights that Amtrak has to gain access to freight rail infrastructure. As a result, we have little leverage other than the power of public opinion in negotiations with freight railroads. Agreeing to full indemnification appears to be the price of access. With rare exceptions, freight railroads—at least the Class I carriers—uniformly require “but for” indemnification for liability. We have not been able to discern an overall position for commuter railroads on the issue of liability other than the implicit one that indemnifying freight railroads is a necessary evil. Given the disparity in bargaining power, the most advantageous recent agreements have been those in which the host railroad is required to pay part of the commuter railroad’s insurance premium and to pay the commuter railroad’s deductible in case of gross negligence or willful misconduct.

Uncertainty about liability limits increases liability insurance costs. Increasing the statutory liability cap increases potential liability for all passenger carriers, and therefore costs for all passenger carriers. Alternatively, establishing a fund for paying claims in excess of perhaps \$100 million, but not in excess of the statutory cap, or authorizing federal funding to pay such claims would provide relief in cases of extraordinary damages without skewing the entire passenger rail insurance market. Increasing federal safety fines and devoting those additional fines to an extraordinary relief fund would address public policy concerns about incentives for safe operations and concerns about how to pay for extraordinary claims.

Background

Amtrak has a statutory right of access to freight rail infrastructure.² The terms of access, however, must be negotiated.³ Liability coverage is a difficult issue, although Amtrak can appeal to the Surface Transportation Board (STB) in event of an impasse.⁴ No fault agreements are the norm. However, enforceability of such indemnification provisions was placed in serious doubt in the wake of a 1988 district court opinion holding that, notwithstanding contractual provisions, Amtrak was not required to indemnify Conrail for gross negligence based on public policy grounds.⁵ Ostensibly in response to difficulties Amtrak experienced in negotiating liability provisions in required shared-use agreements with freight railroads, Congress enacted a \$200 million per incident cap on passenger rail liability and express authorization for passenger rail providers to enter into liability agreements, as well as a requirement for Amtrak to carry an equivalent amount of insurance.⁶ The rationale for the provision in the Amtrak Reform and Accountability Act (ARAA) seems to have been that avoiding litigation between Amtrak and the

² 49 U.S.C. § 24308(a)(2)(B), (c).

³ Amtrak Will Continue to Have Difficulty Controlling Its Costs and Meeting Capital Needs, GAO/RCED-00-138, May 2000, p. 34.

⁴ See Guidebook for Implementing Passenger Rail Service on Shared Passenger and Freight Corridors, NCHRP REPORT 657 (2010), Section 2.5, The Liability Issue, http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_657.pdf.

⁵ National Railroad Passenger Corp. v. Consolidated Rail Corp., 698 F. Supp. 951 (D.D.C. 1988), vacated on other grounds, 892 F.2d 1066 (D.C. Cir. 1990).

⁶ Amtrak Reform and Accountability Act of 1997, 49 U.S.C. 28103 (“ARAA”).

host railroads over liability would expedite recovery to accident victims,⁷ although it has been argued that the freight rail industry was able to force the provision through and that the provision acts as a disincentive to freight rail safety.⁸

Many commuter railroads run over infrastructure owned and/or operated by Amtrak or freight railroads. Unlike Amtrak, commuter railroads do not have a guaranteed right of access to freight rail infrastructure. When the commuter railroads negotiate shared use agreements with the host railroads, the only role the Surface Transportation Board (STB) can play in case of deadlock is to facilitate nonbinding mediation. Similar to the Amtrak situation with freight rail, insurance and indemnity requirements are two of the most challenging issues that must be negotiated under those agreements.⁹ As the STB noted in its 2010 report to Congress, "uncertainty about the relationship between state and federal laws, concerns about risk exposure from recent passenger rail accidents, and relatively tight capacity over some rail lines . . . lead freight railroads and passenger providers to more disparate negotiating positions."¹⁰ The

⁷ The Senate report on ARAA's liability provisions stated:

. . . this bill clarifies that indemnification agreements related to the provision of rail passenger service entered into by Amtrak and other parties would be enforceable. The Committee has been requested by Amtrak to include this provision in order to aid Amtrak in achieving operating self-sufficiency. Amtrak and the freight railroads believe legislation is necessary to confirm enforceability of the indemnification agreements they have entered into regarding operation over each other's rail lines, notwithstanding allegations of gross negligence by a freight railroad or Amtrak. As long as there is the possibility that state laws governing indemnification contracts may make these contracts unenforceable, Amtrak and a freight railroad may find themselves litigating with each other. Amtrak believes that such litigation inevitably would not only adversely impact business relationships between Amtrak and the host freight railroads, but it would also lead to significantly higher outlays in settlements and judgments to plaintiffs.

S. Rpt. 105-85, AMTRAK REFORM AND ACCOUNTABILITY ACT OF 1997,

REPORT OF THE COMMITTEE ON COMMERCE, SCIENCE, AND

TRANSPORTATION ON S. 738, p. 5. Arguably defending the \$200 million liability cap, the chairman of the Metrolink board stated "The rationale is this is the maximum that could be recovered in any event and will expeditiously get the maximum compensation to the victims and their families." Teresa Rochester, Kathleen Wilson, *\$200 MILLION SETTLEMENT CRITICIZED BY METROLINK VICTIMS*, Ventura County Star, Aug. 25, 2010, <http://m.vcstar.com/news/2010/aug/25/victims-say-proposed-200-million-metrolink-isnt/>.

⁸ Walt Bogdanich, *Amtrak Pays Millions for Others' Fatal Errors*, NY Times, October 15, 2004, www.nytimes.com/2004/10/15/national/15rail.html?scp=1&sq=Amtrak%20Pays%20Millions%20for%20Others%20Fatal%20Errors&st=cse. Amtrak's payments for accidents dwarf freight rail payments for safety violations that cause the accidents. *Id.*

⁹ See NCHRP REPORT 657, Section 2.5, The Liability Issue, http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_657.pdf.

¹⁰ June 10, 2010 letter from STB to House Appropriations Committee ("STB June 2010 Liability Letter"), p. 1, <http://stb.dot.gov/stb/docs/Liability%20Report%20letter%2006-10.pdf>. Even in those cases where a commuter railroad owns the infrastructure, such infrastructure was usually acquired from a freight railroad, which in most cases required indemnification as a condition of sale. See, e.g., Keith Laing, *Sparks Fly on Liability Early in Senate Rail Debate*, The News Service of Florida, December 3, 2009, <http://cftlaw.com/news.php?category=Florida+Legislature+News+Headlines&headline=THE+NEWS+SERVICE+OF+FLORIDA%3A++Sparks+Fly+on+Liability+Early+in+Senate+Rail+Debate>. In addition, where the commuter rail operator is considered to be a governmental entity, waiver of sovereign immunity may be

increasing cost of railroad accidents has led freight railroads to seek very high levels of indemnification.¹¹ Some major freight railroads are now requiring \$500 million in liability coverage. In addition to constituting a barrier to entry for new commuter rail service,¹² these demands may create difficulties in renewing existing commuter rail agreements when current, lower liability agreements expire.¹³

Freight railroads have raised questions about the scope of the ARAA liability cap's applicability to commuter railroads; the issue has not yet been litigated to conclusion. Accordingly, the statutory cap has neither provided sufficient certainty to rein in either demands of freight railroads that commuter rail agencies maintain very high levels of insurance, nor the cost of such insurance.

Following the Metrolink crash in Chatsworth, damages from the accident were expected to exceed the statutory cap of \$200 million per passenger rail accident.¹⁴ There have been numerous other passenger rail accidents involving significant injuries and/or fatalities, some clearly due to freight rail culpability. It appears that the Metrolink Chatsworth accident is the only accident to date in which claims might have exceeded the ARAA liability cap.¹⁵ However, the prospect of future accidents resulting in claims exceeding the cap may be sufficient to increase insurance costs.

In response to the prospect of judicial approval of a settlement of \$200 million for outstanding claims, Representative Elton Gallegly (R-CA, 24th District - Ventura and Santa Barbara Counties) in 2010 introduced H.R. 6150, a bill to increase the statutory limitation per passenger rail accident on damages proximately caused by gross negligence or willful misconduct from \$200,000,000 to \$500,000,000, retroactive to September 12, 2008. The proposed legislation would not have increased the statutory cap on damages arising from simple negligence. H.R.

required. Denver RTD Board of Directors Meeting, March 23, 2010, <http://www3.rtd-denver.com/content/BoardOffice/boardMeetingScheduleUpload/03.23.10%20Board%20Meeting%20Agenda.pdf>.

¹¹ NCHRP REPORT 657, p. 16.

¹² Insurance premiums for a new commuter rail agency are substantial, up to as much as 20 percent of operating costs. Even existing agencies may devote as much as 15 percent of their operating budgets to insurance premiums. *Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations*, GAO-09-282 (February 2009), p. 18, www.gao.gov/new.items/d09282.pdf. APTA has asserted that a tight insurance market has forced some transit operators to purchase insurance from overseas carriers at substantially increased costs. September 23, 2010 letter from APTA to Representative Gallegly, opposing H.R. 6150, www.apta.com/gap/letters/2010/Pages/100923_gallegly.aspx.

¹³ NCHRP REPORT 657, p. 30.

¹⁴ Teresa Rochester, Kathleen Wilson, *\$200 MILLION SETTLEMENT CRITICIZED BY METROLINK VICTIMS*, *supra*; Kitty Felde & Molly Peterson, *NTSB places Metrolink Chatsworth crash blame on texting engineer*, Southern California Public Radio, Jan. 21, 2010, www.scpr.org/news/2010/01/21/ntsb-blames-engineer-in-metrolink-crash/.

¹⁵ Erica Werner, *Damages limit a concern in wake of train crash*, LA Daily News, Sept. 18, 2008, www.dailynews.com/breakingnews/ci_10501563.

6150 ultimately attracted 18 co-sponsors, 16 of them from California, but never made it out of subcommittee. (Senator Feinstein, co-sponsored by Senator Boxer, introduced the legislation in the Senate, where it did not emerge from committee.) This legislation could have further increased the difficulty of negotiating liability agreements and the cost of obtaining necessary insurance.

The Senate Commerce Committee language as proposed for §35601 would not have changed the text of §28103, which appears on its face to cap liability for commuter rail just as it does for intercity rail; the provision's effect on liability would have been limited to establishing a minimum required amount of liability coverage for passenger rail. However, the way the provision was drafted I believe it would have caused more confusion about the status of the statutory limitation of liability of commuter rail providers.

Legal Issues

As noted above, most liability and indemnity agreements between passenger railroads (both intercity and commuter) and the freights with whom they share right-of-way are “but for” arrangements : the commuter rail agency indemnifies the freight railroad for all accidents that involve the commuter rail operations, regardless of fault; the freight railroads have been known to escape any liability whatsoever even in cases where the freight railroad was at fault, as long as the commuter operation was involved. There are some no-fault arrangements, but these are rare.¹⁶ Smaller freight railroads may be more willing than Class I Railroads to compromise on the liability issue.¹⁷

Section 28103: The applicability of the \$200 million per passenger rail accident cap under 49 U.S.C. §28103 has not yet been litigated to conclusion. Accordingly a number of legal issues related to the scope of the provision remain outstanding.

- Whether the ARAA liability cap applies to rail operators other than Amtrak. Despite the fact that GAO has concluded that it does,¹⁸ until the issue is litigated at least some freight rail operators refuse to rely on the cap in setting required insurance levels for commuter rail agencies in shared-use agreements. Section 35601 would complicate this issue.
- Whether the ARAA liability cap deprives passengers of due process of law. Plaintiffs in the Chatsworth raised this issue initially, but the settlement has been approved and no appeals have been taken.
- Whether retroactively raising the ARAA liability cap is lawful.

¹⁶ STB June 2010 Liability Letter, p. 7. The STB distinguishes between “no-fault” and “but-for” liability. *Id.* at 10.

¹⁷ Pan Am Railways in New Hampshire insisted on indemnification except for gross negligence. *Line judges: lawmakers weigh purchase of lines for commuter rail*, New Hampshire Business Review, March 13, 2009.

¹⁸ The GAO has concluded that the plain language of the statute shows that the cap cover commuter rail agencies. GAO-09-282, p. 21.

- Whether the ARAA provision concerning allocation of liability preempts state law requirements concerning indemnification. The Second Circuit has held that it does.¹⁹ A Massachusetts District Court, however, has ruled that the ARAA provision does not preempt the commonwealth's policy of not enforcing indemnification agreements for gross negligence.²⁰ The STB has taken the position that indemnifying against gross negligence or willful misconduct violates public policy.²¹ STB staff has indicated that because the Second Circuit opinion deals with preempting state law, not the STB's federal jurisdiction, they believe the Second Circuit opinion will not affect future STB decisions.²² Until the Second Circuit holding is more widely considered settled law, the following issues remain:
 - Whether rail agencies may indemnify against negligence. Assuming no preemption, this depends on state law.
 - Whether rail agencies may indemnify against gross negligence or similar conduct. Assuming no preemption, this depends on state law.
 - Whether the ARAA provisions preempt state law requirements concerning sovereign immunity. The Third Circuit has held that it does.²³ Again it remains to be seen whether this position will be more widely adopted.

Section 35601: This provision would have amended 49 U.S.C. §10901 to establish new certification requirements for persons providing passenger rail transportation over a rail line subject to STB jurisdiction. Proposed subsection (h) would have set forth the determinations the STB must make before granting the required certification. Paragraph (4) would have required that the Secretary determine the applicant "maintains a total minimum liability coverage for claims through insurance and self-insurance of not less than the amount required by section 28103(a)(2) per accident or incident." Thus, the proposed (h)(4) required a minimum amount of liability coverage, without acknowledging that some state laws may provide a lower cap on liability exposure for public agencies.

Policy Issues

The cost of potential liability for accidents is a significant barrier for establishing²⁴ commuter rail service or maintaining existing levels of existing service—the more open-ended the liability,

¹⁹ *O&G Industries v. National Railroad Passenger Corp.*, 537 F. 3d 153 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2043 (2009).

²⁰ *CSX Transportation, Inc. v. Massachusetts Bay Transportation Authority*, 697 F. Supp. 2d 213 (D. Mass. 2010).

²¹ *Boston and Maine Corp. and Springfield Terminal Railway Co. v. New England Central Railroad*, STB Finance Docket No. 34612 (2006), at 1-2.

²² GAO-09-282, p. 23.

²³ *Deweese v. National Railroad Passenger Corp.*, 590 F.3d 239 (3d Cir. 2009).

²⁴ *See, e.g.*, Developing Viable High Speed Rail Projects under the Recovery Act and Beyond, October 14, 2009, GAO-10-162T, p. 4, www.gao.gov/new.items/d10162t.pdf; Cindy Kibbe, *Funding the big issue for*

the more expensive the required insurance. For example, a \$75 million cap on commuter rail liability in New Hampshire was estimated to cut the cost of insurance by two-thirds.²⁵ There are a number of policy issues that could affect how liability costs are addressed.

- Whether the ARAA liability cap should be extended to cover third party claims. Currently these claims are additional liability beyond the statutory cap.
- Whether federal law should standardize liability and indemnity provisions, for example by explicitly extending the \$200 million insurance requirement to carriers other than Amtrak, and if so, how the federal government would assist the states in managing the extra costs imposed by this unnecessary expansion of insurance costs.
- Doing so could affect other provisions of shared use agreements.²⁶
- Doing so could disadvantage commuter rail operators that currently carry liability coverage to the (lower) limitation of liability under state law.
- Federal law already mandates a \$200 million liability coverage floor in its limitation of liability for Virginia commuter rail providers for incidents in the District of Columbia.²⁷
- The May 12, 2010 FRA guidance on stakeholder agreements for the High-Speed Intercity Rail Program would have required grantees and/or operators of projects funded under Tracks 1 or 2 of the program using railroad right-of-way to carry a minimum of \$200 million of liability coverage through insurance and self-insurance.²⁸ We have found no indication thus far that FRA has extended such requirements to commuter rail operations, which may be the genesis for §35601.
- Whether federal law should mandate commuter rail access to freight rail/Amtrak facilities. This could provide more negotiating leverage for commuter rail agencies.

transportation projects, New Hampshire Business Review, May 7, 2010, www.nhbr.com/business/transportation/726545-285/funding-the-big-issue-for-transportation-projects.html (noting that passing liability cap was “fundamental” to bringing passenger rail to New Hampshire).

²⁵ *Line judges: lawmakers weigh purchase of lines for commuter rail*, New Hampshire Business Review, March 13, 2009.

²⁶ STB June 2010 Liability Letter, p. 3.

²⁷ 49 U.S.C. 28102.

²⁸ Paragraph 39, p. 15. It is unknown whether this requirement will remain in the guidance if and when it is reissued. *FRA rethinking guidance for HrSR corridors*, Railway Age, August 20, 2010, <http://www.railwayage.com/index.php/news/fra-rethinking-guidance-for-hrsr-corridors.html#.T9Zydj5YtKo>.

- Whether federal law should facilitate alternatives to commercial insurance to alleviate commuter rail agencies' difficulties in procuring insurance. However, commercial insurance can prove to be less expensive than public transit liability pools.²⁹
- Whether Congress should appropriate funding to provide compensation in excess of the statutory cap (modeled on Price-Anderson Act for nuclear disasters).³⁰

Recent Negotiations

In 2008 the Boston transit system reached a compromise for an extension of a commuter rail line, breaking an impasse in liability negotiations. A similar compromise was adopted to resolve part of SunRail's contentious liability situation. These are described below.

MBTA and CSX (Boston to Worcester line): Negotiations were held up by the question of indemnification for gross negligence. The Massachusetts delegation advised CSX that if an agreement were not reached on the issue, congressional action, "including potential legislative solutions mandating what is acceptable in freight-commuter rail contracts" was possible.³¹ The parties subsequently reached agreement: CSX will contribute \$500,000 toward the cost of MBTA's \$3.9 million liability insurance policy; CSX will have to pay the deductible, up to \$7.5 million per accident, for any accident in which the freight railroad is "clearly at fault because of willful misconduct." This standard eliminates the requirement that MBTA indemnify for gross negligence/willful misconduct, as would be required under the "industry standard" strict no-fault provision. However, in order to avoid indemnification for a particular accident, the MBTA would have to establish willful misconduct, a bar described by at least one plaintiff's lawyer as "challenging."³²

SunRail, CSX, and Amtrak: Approval of the SunRail commuter service has been a matter of contention in Florida for years;³³ indemnifying CSX has been a critical stumbling block. Supporters who supported amending Florida law to allow indemnification have raised the

²⁹ The board of directors of the Richmond, Virginia, transit agency voted in 2010 to purchase commercial insurance rather than continue with the public transit liability pool that the agency helped to found. Michael Martz, *GRTC gets new insurance policy*, Richmond Times-Dispatch, July 21, 2010.

³⁰ Erica Werner, *Damages limit a concern in wake of train crash*, *supra*.

³¹ Ralph Ranalli, *No fault? No way, CSX told*, The Boston Globe, April 10, 2008, www.boston.com/news/local/articles/2008/04/10/no_fault_no_way_csx_told/.

³² Priyanka Dayal and John J. Monahan, *CSX deal hailed*, Sept. 24, 2009, Worcester Telegram & Gazette, www.telegram.com/article/20090924/NEWS/909240679/1116; Noah Bierman, *Deal expected to boost commuter rail service*, The Boston Globe, September 24, 2009, www.boston.com/news/local/massachusetts/articles/2009/09/24/deal_expected_to_boost_commuter_rail_service/.

³³ Joe Follick, *CSX-SunRail Deal Faces Showdown in Senate*, The Ledger, Apr. 29, 2009, www.theledger.com/article/20090429/NEWS/904295049/1134?p=1&tc=pg.

argument that no-fault indemnification will in fact speed resolution of claims.³⁴ The CSX indemnification issue was finally resolved based on the MBTA model: Florida agreed to purchase a \$200 million liability insurance policy, with CSX agreeing to pay a portion of the premium and the approximately \$10 million deductible in cases caused by CSX's willful misconduct.³⁵ Amtrak has also requested the same indemnification that was approved for CSX. In response to the argument that this is more protection than Amtrak has in its operating agreement with Tri-Rail, Amtrak asserted that the Tri-Rail agreement should not be continued. Although Amtrak dropped its absolute insistence on receiving the same protection as that afforded CSX,³⁶ Florida recently enacted a bill providing such protection, effective July 1, 2012.³⁷ The \$200 million indemnification may cover tracks shared with Tri-Rail.³⁸

Position of Freight Railroads

Freight railroads by and large take the position in negotiations that risks of injury to rail passengers, persons picking up and dropping off passengers, etc. would not arise "but for" the operation of passenger rail, and that therefore passenger rail operators should be responsible for all such "but for" liability, and should indemnify the host railroads for such liability.³⁹ There is some indication that freight railroads view indemnification as the price for carrying passengers on their tracks.⁴⁰ The Association of American Railroads takes the position that sharing tracks or right-of-way with passenger trains requires that liability issues be "responsibly and fairly addressed" by providing coverage for "but for" liability.⁴¹

³⁴ Keith Laing, *Sparks Fly on Liability Early in Senate Rail Debate*, The News Service of Florida, December 3, 2009, <http://cftlaw.com/news.php?category=Florida+Legislature+News+Headlines&headline=THE+NEWS+SERVICE+OF+FLORIDA%3A++Sparks+Fly+on+Liability+Early+in+Senate+Rail+Debate>.

³⁵ Marc Caputo and Lee Logan, *Senate clears rail bill, on to Gov. Crist*, St. Petersburg Times, Dec. 9, 2009, www.tampabay.com/news/politics/stateroundup/senate-clears-rail-bill-on-to-gov-crist/1057417; Abel Harding, *CSX's Ward: SunRail good deal for state, high-speed will cost billions*, the Florida Times-Union, December 16, 2009, http://jacksonville.com/interact/blog/abel_harding/2009-12-16/csxs_ward_sunrail_good_deal_for_state_high_speed_will_cost_bil. See also, George F. McClure, *SunRail Liability Fully Protects At-Risk CSX*, Florida Political Press, July 6, 2011, <http://www.floridapoliticalpress.com/2011/07/06/sunrail-liability-fully-protects-at-risk-csx/>.

³⁶ Dan Tracy, *SunRail back on track after Amtrak backs down*, Orlando Sentinel, December 8, 2010, http://articles.orlandosentinel.com/2010-12-08/business/os-amtrak-sunrail-20101208_1_sunrail-supporters-central-florida-commuter-train-amtrak-officials.

³⁷ <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=47811>.

³⁸ Michael Van Sickler, *Florida taxpayers would pay tab for damages caused by train crashes*, Miami Herald, Feb. 26, 2012, <http://www.miamiherald.com/2012/02/26/2662931/florida-taxpayers-would-pay-tab.html#storylink=cpy>.

³⁹ See, e.g., STB June 2010 Liability Letter, p. 3.

⁴⁰ Walt Bogdanich, *Amtrak Pays Millions for Others' Fatal Errors*, *supra*.

⁴¹ Freight and Passenger Rail: Finding the Right Balance, Association of American Railroads (March 2011), p. 2, <http://www.aar.org/~/media/aar/Background-Papers/Freight-and-Passenger-Rail.ashx>.

An accident involving a passenger train on freight-owned property, though rare, could involve major casualties and potentially ruinous liability claims. Because of this risk, freight railroads must be adequately protected from liability that would not have resulted but for the presence of passenger service.

However, AAR has changed its position paper from 2010 by striking a third sentence: "Inadequate liability protection would constitute an unwarranted subsidy of passenger railroads by freight railroads."

Freight railroads also argue that eliminating litigation over fault in fact speeds recovery by injured parties.⁴² Although freight railroads have described complete indemnification as the industry standard and "nonnegotiable," the point has in fact been negotiated (see MBTA and CSX, above). Freight railroads also argue that indemnification for gross negligence is not a disincentive to safety.⁴³

Position of Commuter Railroads

APTA has clearly stated that increasing the statutory cap on liability will increase insurance costs for commuter rail operators.⁴⁴ In addition, APTA has expressed interest in establishing a national insurance pool.⁴⁵ However, we were not able to find a clear statement of APTA's position on no-fault indemnification; APTA's letter opposing §35601 did not touch on alternatives such as insurance pooling. At least one commuter rail body arguably defended the existence of the statutory cap.⁴⁶

CONTRACTOR CERTIFICATION

As to the efficacy of the proposed requirement that contracted operators be licensed under rules and requirements to be determined by the Surface Transportation Board, we do not see any such benefit to our customers and we fear that besides adding additional costs that we will eventually bear, this will also erect an unfair barrier to market entry that will have a direct impact on the competitive pricing we all seek in our contract agreements.

Today there are but only five qualified, active competitors in this marketplace: Amtrak Commuter Services, Veolia Transportation, Keolis, Bombardier and Herzog, and Keolis has only entered this market within the past two years. During our last competitive procurement, all

⁴² Ralph Ranalli, *No fault? No way, CSX told, supra*.

⁴³ Walt Bogdanich, *Amtrak Pays Millions for Others' Fatal Errors, supra*.

⁴⁴ September 23, 2010 letter from APTA to Representative Gallegly, opposing H.R. 6150, www.apta.com/gap/letters/2010/Pages/100923_gallegly.aspx.

⁴⁵ *E.g.*, VRE Board Agenda, May 18, 2007, http://www.vre.org/about/Ops_board_items/2007/May/Action_Item_8A_CSX.pdf.

⁴⁶ Teresa Rochester, Kathleen Wilson, *\$200 MILLION SETTLEMENT CRITICIZED BY METROLINK VICTIMS, supra*.

three proposers (Veolia, Amtrak and Keolis) were deemed to be qualified bidders following our in-depth analysis of their experience and capabilities. I do not believe that any other agency, federal, state or local, could have conducted a more detailed analysis than what was completed here, and therefore I am fearful that the provisions concerning a federal licensing process would only serve to limit competition and thus result in higher costs to an agency such as SFRTA.

I have seen the arguments put forward in support of the licensing provision in S.1813, comparing the licensing and safety monitoring systems in place with the Federal Motor Carrier Safety Administration and I am neither convinced that our current operating environment requires such additional federal oversight, nor am I in agreement that this is a fair comparison. Current operating requirements and safety oversight for all rail operators (public and private; passenger and freight) are enforced through the Federal Railroad Administration and there is nothing to indicate that this oversight is in any way lacking. Further, oversight of contracted trucking and freight hauling services is in my view an apples and oranges comparison.

CONCLUSION

Mr. Chairman, in conclusion, let me summarize several key points of my testimony before this committee: (1) competitive contracting for Train Operations and Maintenance Services has served us well since we commenced passenger services in 1989; (2) there is no need or justification for adding new certification and/or liability coverage requirements as was proposed in S. 1813 earlier this year, and; (3) while we welcome Amtrak's participation in the commuter rail industry on a level playing field with other private contractors, we fear that their recent lawsuit over whether one contractor can approach employees of another for submission in a competitive procurement will chill the marketplace and only make the job of evaluating competing proposals more difficult.

As I have summarized here, the experience over the past 23 years at SFRTA with competitive contracting has provided us with unique insights into the marketplace and process for selecting contractors and we could have a separate hearing alone on the process and experience and lessons learned. Suffice to say that it is a process that requires forethought, diligence and attention to details. With the lessons learned at SFRTA and other agencies across the country, I believe it is a method that can prove successful for all public entities evaluating their options for rail services.

Because we have a strong record of success with our procurements for contracted services, I do not believe there is a need for further federal intervention into the process to set new standards for certifying potential proposers or requiring additional liability insurance coverages. The process employed by SFRTA and many other commuter rail agencies evaluating contractor bids, not only ensures that the most qualified bidders are considered, but it ensures that the best price available in the marketplace is achieved. And it is our belief that this is the most economic option available to us today.

If the Congress wishes to further explore the concepts of certification and/or liability coverages, we would be very interested to participate in that discussion and welcome the opportunity to express in detail the significant cost implications associated with these two issues.

Finally, as noted earlier, SFRTA has a long-standing business relationship with Amtrak through the agreement for dispatching services and through our coordination with Amtrak Intercity Passenger Services. In addition, we have welcomed their past participation in our competitive bidding process for commuter rail services and we envision continuing to do so in the future. We are concerned about the implications resulting from their recent lawsuit with Veolia and hope that the past practices of contractors allowing employees of one organization to speak with others without fear of legal actions will continue. As a public agency official, I view this issue as a critical component of our contract evaluation process.

Mr. Chairman, thank you again for the opportunity to appear here today on behalf of SFRTA. I would be pleased to answer questions now or in the future.