Coordination with Railroads to Facilitate Acquisition of ROW

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Acronyms

AASHTO	American Association of State Highway and Transportation Officials
CFR	Code of Federal Regulations
ConnDOT	Connecticut Department of Transportation
DelDOT	Delaware Department of Transportation
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
HEPR	FHWA Office of Real Estate Services
MassDOT	Massachusetts Department of Transportation
MBTA	Massachusetts Bay Transportation Authority
MDOT	Maryland Department of Transportation
NCHRP	National Cooperative Highway Research Program
NEC	Northeast Corridor
NJDOT	New Jersey Department of Transportation
NYSDOT	New York Department of Transportation
PennDOT	Pennsylvania Department of Transportation
RIDOT	Rhode Island Department of Transportation
ROW	Right of Way
SDOT	State Department(s) of Transportation
SHRP2	Strategic Highway Research Program 2
STB	Surface Transportation Board
UA	Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended

Executive Summary

It has been observed by the FHWA Office of Real Estate Services (HEPR) that there has been an emerging national trend for increasingly difficult and time consuming right-of-way (ROW) access agreements and acquisitions of smaller parcels from railroads. The frequent complaint is that railroads are slow to process requests for access rights and State Departments of Transportation (SDOTs) have a difficult time reaching an amicable negotiated settlement.

In response SDOT requests to HEPR headquarters, the Federal Highway Administration has determined that it would be a worthy research effort to explore ways in which SDOT ROW access agreements and real estate acquisitions from railroads could be expedited to the benefit of all stakeholders and the safety and convenience of the traveling public.

HEPR is aware that addressing this issue on a national scale would be a monumental task, far exceeding the level of resources currently available. The HEPR office is aware of recent comments on the difficulty of achieving timely acquisitions of rights needed for highway construction and improvement in the northeastern United States. This project will be confined to research of this problem in the northeastern United States, specifically those States through which the National Railroad Passenger Corporation (Amtrak) operates its Northeast Corridor.

In one sense this current effort can be viewed as a follow on of the research reported in the SHRP2 report *Strategies for Improving the Project Agreement Process Between Highway Agencies and Railroads.* That effort was broader in scope and examined nationwide problems associated with the engineering reviews of highway/railroad projects, primarily involving the freight railroads.

The purpose of this research is to develop approaches which will be useful to acquiring agencies as they advance right-of-way access and land acquisition programs. This includes identifying the best ways to use HEPR resources to help SDOTs and other local public agencies successfully and expeditiously achieve railroad access agreements and acquisitions consistent with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended, also known as the Uniform Act (UA).

The objectives of this project were to

- Identify strategies and institutional arrangements that will facilitate beneficial relationships between railroad companies and public agencies; and
- Identify barriers to an effective agreement process and propose remedies.

In order to meet these objectives Volpe organized and conducted a web conference (a "webinar") of representatives from SDOTs within the Northeast Corridor (NEC). FHWA Division offices, and FHWA Headquarters personnel that have experience in the subject matter. The goal of the webinar was to gather information on stakeholders' experience in acquiring a variety of real estate rights and interests from Amtrak and other railroads. The information gathered at the webinar served as the foundation for the development of a series of questions used in the activities described below.

Following up on the webinar, Volpe interviewed State Directors of Right-of-Way about how they are implementing the railroad acquisition element of their right-of-way programs. The Directors of Right-of-Way interviewed included those of the States included in Amtrak's NEC.

Volpe interviewed Amtrak real estate staff to ascertain their involvement and input to the railroad out- conveyance process. The inquiry was similar in scope to that described for State Directors of Right-of-Way.

Key observations and findings include:

- Major concerns and points of contention revolve around indemnification in general, the assignment of environmental and other risks, and related financial payments.
- The price of the easement/acquisition has not been a contentious issue. The real issue is not price but State rights vs. Amtrak's "Federal" right in ROW acquisition.
- Flaws in the mechanics of the process cause unnecessary delay.

Best practice opportunities for DOTs are:

- Use annual meetings with Amtrak to review and update the current process and provide an annual list of upcoming projects.
- Establish early formal coordination with Amtrak while project concepts are still under development. Utilize staff who are familiar with railroads in order to avoid proposing something that would be unacceptable to a railroad from an operational point of view.
- Negotiate a memorandum of understanding between the highway agency and Amtrak as to how they desire to conduct the review process, with deadlines set in advance, and realistic expectations and timeframes for review and approval.
- Establish a system for tracking progress to make sure milestones are met in a timely fashion.
- Meet on a regular basis to discuss the status of projects and agreements to remove uncertainty and keep things moving through the process smoothly and to make sure Amtrak is kept up to date.

FHWA can further help States achieve desired outcomes by removing existing obstacles.

Opportunities and potential next steps for FHWA are:

- Share the results of this research with the stakeholders within the NEC, both SDOT's and Amtrak, in order to highlight the shared concerns and problems identified by the participants, and provide an additional forum for further comment.
- Explore the concept of the "environmental risk fee"[1], and if appropriate, revise existing regulations, to have this included as a reimbursable project expense.
- Review limits and requirements for liability insurance in the Federal regulations and update as required in order to eliminate the need for SDOTs to seek a case-by-case Federal exemption to pay the higher limits, and remove a potential sticking point from their negotiations with Amtrak.
- Fund research on the status of Amtrak relative to the States' power of eminent domain and distribute the findings to the SDOT's in order to take this issue off the table once and for all.
- Facilitate annual meetings between SDOT's and Amtrak to discuss upcoming projects, review outstanding problems on past/current projects of common interest, and identify points of contact within Amtrak and the SDOT's who will be involved with the projects.

[1] The "environmental risk fee" was developed by Amtrak. Its purpose is to protect Amtrak from environmental liabilities discovered when other entities have projects on Amtrak properties. The risk fee is paid by an entity to Amtrak to cover potential environmental liability that may be uncovered by the project. This is a risk fee/risk cap that establishes an upfront cost in which the State will take the first $X in risk. Amtrak will take on all liability above dollar amount for a one-time fee. Amtrak collects the fee and keeps it in reserve for any project that encounters contamination requiring remediation. Amtrak tries to set risk fees and caps based on prior experience with this type of risk.

1 Background

1.1 Problem Statement

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), as amended, provided that one of its purposes is '… to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts...." It has been observed by the FHWA Office of Real Estate Services (HEPR) that there has been an emerging national trend for increasingly difficult and time consuming right-of-way (ROW) access agreements and acquisitions of smaller parcels from railroads.

The Office of Real Estate Services wants to identify and promulgate effective means of accomplishing the intended Uniform Act goals of minimizing administrative costs and expediting the acquisition of real property and real property access rights from railroads.

In response to State Departments of Transportation (SDOTs) requests to HEPR headquarters, the Federal Highway Administration has determined that it would be a worthy research effort to explore ways in which SDOT ROW access agreements and real estate acquisitions from railroads could be expedited to the benefit of all stakeholders and the safety and convenience of the traveling public.

The frequent complaint is that railroads are slow to process requests for access rights and SDOTs have a difficult time reaching an amicable negotiated settlement. HEPR is aware that addressing this issue on a national scale would be a monumental task, far exceeding the level of resources currently available. The HEPR office is also aware of recent comments on the difficulty of achieving timely acquisitions of rights needed for highway construction and improvement in the northeastern United States. This project will be confined to research of this problem in the northeastern United States, specifically those States through which Amtrak operates its Northeast Corridor.

Amtrak owns or leases much of the "Northeast Corridor" (NEC).[2] The Amtrak-owned or leased NEC runs (with very few breaks in the right-of-way) from Washington D.C. to Boston. The NEC is also considered to include the right-of-way from Philadelphia to Harrisburg Pennsylvania and from New Haven Connecticut to Springfield Massachusetts.

[2] The NEC passes through the District of Columbia and the States of Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts.

In one sense this current effort can be viewed as a follow on of the research reported in the SHRP 2 report *Strategies for Improving the Project Agreement Process Between Highway Agencies and Railroads.*[3] That effort examined nationwide problems associated with the review of the safety, engineering, and operating effects that highway projects have on the railroad during construction and thereafter. While the main focus is on engineering reviews of highway/railroad projects the report does touch on issues related to ROW access/acquisition, insurance and indemnity and places these within the context of the overall project development process.

Many of the "best practices" and recommendations developed for improving the process for engineering reviews are "generic" and would apply to the processes related to ROW easements and acquisitions.

Effective implementation of Uniform Act provisions is vital to the HEPR obligation to successfully meet its lead agency responsibilities. The purpose of this research is to develop approaches which will be useful to acquiring agencies as they advance right-of-way access and land acquisition programs. This includes identifying the best ways to use HEPR resources to help SDOTs and other local public agencies successfully and expeditiously achieve railroad access agreements and acquisitions consistent with the provisions of the Uniform Act, i.e., encouraging and expediting the acquisition of real property by agreements with Amtrak and other railroad operators, avoiding litigation, assuring consistent processing of acquisition requests and promoting public confidence in Federal-Aid Highway ROW acquisition practices.

1.2 Research Approach

The objectives of this project were to

- Identify strategies and institutional arrangements that will facilitate beneficial relationships between railroad companies and public agencies; and
- Identify barriers to an effective agreement process and propose remedies.

In order to meet these objectives Volpe organized and conducted a webinar of representatives from SDOTs, FHWA Division offices, and FHWA Headquarters personnel that have experience in the subject matter. The goal of the webinar was to gather information on stakeholders' experience in acquiring a variety of real estate rights and interests from Amtrak and other railroads. The information gathered at the webinar served as the foundation for the development of a series of questions used in the activities described below.

[3] *Strategies for Improving the Project Agreement Process Between Highway Agencies and Railroads,* Report S2-R16-RR1, Transportation Research Board, Washington, D.C., 2010. http://onlinepubs.trb.org/onlinepubs/shrp2/SHRP2_S2-R16-RR-1.pdf

Following up on the webinar, Volpe interviewed State Directors of Right-of-Way about how they are implementing the railroad acquisition element of their right-of-way programs. The interviews were aimed at determining: (a) at what point of the project management process the railroad is brought into the process (e.g., scoping, design, or acquisition); (b) whether railroad transactions are handled by a special group of railroad acquisition experts; (c) how the SDOTs determine the extent of real estate rights and interests required; and (d) the degree to which the SDOTs were using staff appraisers to perform railroad valuations. The Directors of Right-of-Way interviewed included those of the States included in Amtrak's NEC.

Volpe interviewed Amtrak real estate leadership to ascertain their involvement and input to the railroad out-conveyance process. The inquiry was similar in scope to that described for State Directors of Right-of-Way. By means of this interview Volpe attempted to ascertain, among other things: (a) how the dollar amount for a proposed out-conveyance is determined;{b) whether there is a uniform application process for such SDOT real estate transactions; (c) whether there is a uniform process for evaluating the SDOTs requests; and (d) if there is a defined time limit for a response to the SDOTs.

2 Findings

Amtrak works with many State DOTs, understands that States have to undertake projects and negotiates in good faith towards completion. Generally, the "business" parts of the project agreements are agreed to relatively quickly. The issues that lead to more challenging negotiations are liability, indemnification, the assignment of environmental and other risks and the associated payments.

2.1 Types of Typical Projects and Required Agreements

Even in the limited number of State comprising Amtrak's Northeast Corridor, this research found little in the way of "typical" projects and associated real estate agreements. Projects ranged from construction of a bus way on Amtrak ROW through construction of new stations, to replacement of highway bridges over Amtrak right of way. Types of transactions generally involved temporary and permanent easements although some did involve a fee acquisition. While some States had extensive recent experience in dealing with Amtrak on ROW issues, others could only provide a limited set of past projects. The example projects involving Amtrak and the SDOTs noted by the interviewees are discussed below.

The main project discussed by Connecticut Department of Transportation (ConnDOT) was the development of a Bus Rapid Transit line. The project involved a 9.5 mile corridor for the planned New Britain-Hartford Bus way and involved temporary and permanent easements. Other projects related to new Amtrak stations involve acquisition of private property not Amtrak property.

Amtrak sold Rhode Island Department of Transportation RIDOT the property for the garage for a new commuter rail station in Wickford, and provided an easement to build the platform. For an intermodal facility at T .F. Green Airport in Warwick, they negotiated a series of easement agreements to allow building over the track and adjacent station, with a series of engineering force agreements to allow the work to take place.

The Pennsylvania Department of Transportation (PennDOT) noted that they had about 20-30 projects involving Amtrak at various stages of negotiation and implementation. PennDOT has experience with design/construction agreements for crossings, closings, and bridge replacements. A station reconstruction project in Lancaster, Pennsylvania involves permanent and temporary easements, as well as fee simple acquisitions.

The Massachusetts Department of Transportation (MassDOT) did not discuss any specific projects. Because the Massachusetts Bay Transportation Authority (MBTA) is a division of

MassDOT and owns the Northeast Corridor ROW in Massachusetts, the real estate agreement process with Amtrak is different than in other States.

The remaining States had no current projects involving Amtrak but shared their experience from the recent past.

The Maryland Department of Transportation (MDOT) last dealt with Amtrak in 2007. In this project, MDOT wanted a permanent easement for aerial rights in order to fix an existing bridge over Amtrak ROW. MDOT already had an easement for the bridge. Amtrak did not want to grant a perpetual agreement and wanted to keep total control of their property. In order to complete the project they negotiated a right of entry agreement. No exchange of money took place.

While the New Jersey Department of Transportation (NJDOT) did not have any recent projects involving Amtrak, they did have past experience with Amtrak. The main interaction with Amtrak involved bridge replacements over Amtrak tracks. The projects were a viaduct replacement and a bridge replacement. Both projects were in the same general area, and both crossed over the Northeast Corridor main line. The ROW activity occurred in the late 90's and early 2000's and actual construction occurred around 2007. NJDOT also reported that they had acquired land from Conrail in 2008 but that there were no rail tracks involved.

The New York Department of Transportation (NYSDOT) provided examples of recent agreements with Amtrak. None of these takings involved an active rail line and there were no service interruptions. These included a temporary easement initiated in 2000, a fee acquisition initiated in 1994, and a fee acquisition and two permanent easements for transportation enhancement initiated in 2000. NYSDOT has also acquired property for Amtrak, e.g., ROW for a third track in upstate New York and also for stations.

2.2 Roles and Responsibilities

2.2.1 Highway Agencies

There does not appear to be a "typical" State DOT approach or organizational structure for dealing with rail ROW projects at least in the limited number of States lying within the NEC.

In Connecticut, the ROW division is responsible for negotiation, acquisition, and relocation across the State for any transportation-related needs. The office does not serve a legal function; instead, the legal arm is the State Attorney General's office, whose involvement is limited to condemnation and litigation. The office is located in the State Department of Transportation in the Highway Bureau, but deals with all transportation ROW issues. Transit projects are also handled by the highway group because the transit group in ConnDOT does not have its own ROW group

In Maryland, districts are responsible for acquisitions from private parties (homeowners, companies, etc.). Part of the headquarters group called “special acquisitions” deals with railroads, public utilities, and other government entities.

In Massachusetts there are two offices for real estate in MassDOT, and one office for MBTA. One of the MassDOT offices normally works with acquisitions for highways (acquiring property for bridge, roadway, and traffic mitigation). This office normally works on highway projects, but has recently been tasked more with rail. The other office serves more of a development/property management role. Most people involved in negotiations involving rail-related real estate transactions are MassDOT and rail road lawyers with a few MassDOT and rail road operating people. The MBTA real estate office utilizes a consultant.

In the New Jersey cases, the project manager negotiated the right of entry with the Amtrak engineering department. The agreement was signed off on by the project manager at DOT headquarters and an Amtrak vice president and Chief Engineer. At NJDOT, the Director of ROW and Access Management has the right of approval, but the Attorney General is required to review all “contracts” between the DOT and others.

NYSDOT has 11 regional offices each with a ROW group and its own negotiation section. The offices start and often complete the ROW acquisition process. Only “stickier” projects go to headquarters, and are elevated as needed if not handled at regional level. At headquarters this involves the ROW group, and the AG. The Attorney General is the official lawyer for the DOT, and also has its own rail property group. Force accounts are handled through the “rail” group in NYSDOT, not by the ROW group.

2.2.2 Amtrak

There is significant coordination across offices within Amtrak. Offices involved are legal, real estate, engineering, risk management, finance, and planning among others.

Internally, the legal counsel takes the lead and drafts the agreements. Legal and real estate offices work together to ensure the real estate and engineering agreements are consistent. Throughout the process, the appropriate offices are given opportunity to comment. For the real estate agreement, the Amtrak legal office signs off as approved to form and legality, not always for content.

2.3 The Agreement Process

2.3.1 Highway Agencies

Connecticut

Process

For the bus way project, engineering was the primary focus, though utilities and legal issues were also involved. Because of the complicated nature and engineering of the project, those responsible at the ROW office decided that a team approach would be the best approach to negotiations, and put together a team including engineering, utilities, and legal (staff attorney from commissioner's office) representatives. ConnDOT believed that this approach was an appropriate response to Amtrak's approach to the conveyance documents. Complicated engineering led to a complicated ROW negotiation process.

Agreement Documents

The conveyance document was primarily an operating agreement. Amtrak preferred the ROW conveyance and operating agreements to be in one document, while ConnDOT preferred them to be separate. The conveyance documents contain detailed information on project activities on Amtrak's property. Amtrak wanted it recorded and on the land record as a permanent document. Amtrak wanted to retain all ownership rights so the property transactions involved only easements, which simplified the ROW problems.

Easements are either temporary or permanent and vary by location within the corridor. The permanent easements have been executed, but the temporary easements are still in progress. The original approach of ConnDOT was to combine all easements into one transaction and conveyance document, while Amtrak preferred that the temporary and permanent easements be separated. Currently, the two parties are in the process of developing the temporary easement instrument, which is very similar to the permanent easement one, but does not contain information on compensation.

Fees and Compensation

All payments to Amtrak (those associated with both the permanent and temporary easements) are assigned to the permanent easement documents.

Schedule

The ROW acquisition process started in Oct 2008. The actual agreement was reached in 2010, and signed in April 2011. ConnDOT formally filed the final conveyance documents and

provided compensation in November 2011. The temporary easement agreement was still pending at the time of the interview in December 2011. There is a temporary easement for the construction period. The timeline is part of what they're working on right now. The temporary easement agreement included some of what would normally be in the force account agreement. There are aspects of the project where ConnDOT needs to access property to do things on their own behalf. Amtrak wants to have control of certain part of construction. It is not just an issue of flagmen, since there are instrument panels, signal control boxes, etc. that need to be moved out of the way during construction.

A lot of time was spent determining both the operational language and legal language, because the operational and conveyance documents were combined into one. Amtrak sought an agreement that would have no impact on their operations or liability. Reciprocity became a major issue. Amtrak wanted certain protections, and ConnDOT also wanted to guarantee those protections for the State. ConnDOT indicated that the agreement might have been completed more quickly if it were only a ROW agreement, as coupling the ROW agreement with an operating agreement involved a large number of reviewers on each side. For example, on the Amtrak side, real estate, legal, engineering and operations were involved. If they were to repeat the experience, they would have facilitated the process by having a smaller group. They noted that a key decision maker from Amtrak wasn't always available at various points in the process, resulting in delays.

Maryland

Process

The construction department notifies the real estate group of the area needed and the dates needed for construction. They will also notify them if the project will require access to railroad property.

The Office of Plats and Surveys develops maps (plot plans) and gives them to the Office of Real Estate. The Office of Real Estate puts out a bid for appraisers, selects the lowest bidder, and has them conduct a full appraisal to use in the offer to Amtrak or other railroad.

MDOT stated that the vast majority of the time, Amtrak does not agree and says no to an agreement involving property interests (easements, fee exchange), and prefers entry agreements to easements.

MDOT does not negotiate in-person with Amtrak; all communication is handled by mail, email or telephone. Special acquisitions handles the negotiations, the other parties involved are the Legal Department and director of the Office of Real Estate.

Agreement Documents

MDOT has never bought land from any railroad, but rather they rely on easements or entry agreements. Since Amtrak prepares the entry agreement, MDOT perceives the conditions to generally be more favorable towards Amtrak. Also, as the State is seeking something from Amtrak (or railroad in general), MDOT perceives the power and leverage to lie with the railroad. It is not mandatory for Amtrak to sign the entry agreement. Maryland never starts a project without a signed agreement.

Fees and Compensation

If money is involved it is placed in an escrow account. The railroad or utility can choose whether or not to accept it. Usually the State does not have to pay for reviews or legal fees as part of the project process.

Schedule

The process is iterative and takes approximately 6 to 18 months in general - usually around 6 with Amtrak. But MDOT tries to facilitate the process by remaining in communication with Amtrak about what needs to be done. MDOT feels the process is sometimes lengthened because there can be gaps where progress is not made. The process and time required has not changed over the years for better or worse.

Massachusetts

Process

The Real Estate Office would initially approach MBTA, but most of the coordination would be between the highway department and Amtrak. They would coordinate with Amtrak for scope, so Amtrak can estimate the cost to support the particular construction activity. Because MBTA owns the ROW, Amtrak does not have the ability to say no.

Amtrak is a tenant but provides dispatching, and maintenance of ROW, and has a need to know. MassDOT works with MBTA who hires Amtrak as a “contractor”. Amtrak would handle all the details related to the construction project from the rail side. If Amtrak operations would be affected, MassDOT would take that into consideration and would look to minimize disruption to rail operations, as disruption would also affect MBTA’s operations.

MassDOT finds that the process goes smoother when the design engineers involve the rail group early, or if the design engineers themselves have rail experience. Having someone who understands railroads needs saves time because they don’t have to deal with proposals that aren’t necessarily in the best interest of Amtrak or another railroad. Any time there’s a negotiation

about railroad ROW, Amtrak or freight, it is important to have someone with railroad knowledge and experience to stop the State from asking for something that would be adverse to the railroad.

For a repair of two railroad bridges that they initially thought would require the shutdown of Amtrak Downeaster service, along with freight railroad service, early coordination lead to a solution that didn't require a service shutdown for 7 days, as originally proposed, and saved $2 million.

Agreement Documents

With CSX, most recent agreements have been long-term leases for access to passenger stations for construction activity. Most of their dealing with CSX on ROW issues has involved building stations on CSX ROW. These have included leases, easements and acquisition/ownership. Most recent activity has involved leases.

Compensation for long-term leases is determined as a monthly payment. The leases are normally something that happens early on in the process, with the appraisal likely done by someone hired by the MBTA real estate division.

Fees and Compensation

Overall, this issue is not as applicable for Massachusetts because MBTA owns Northeast Corridor ROW. There are advantages to owning the ROW. As an example, for flag protection, MBTA and Amtrak would reach an agreement and MBTA would then hire Amtrak. There are two levels of cost structure Amtrak can use for this. Generally, MBTA indemnifies Amtrak for a number of things and pays a lower compensation price for flagmen than what would be paid for by a third party, because Amtrak would otherwise add insurance.

New Jersey

Process

For the example projects considered, the project manager negotiated the right of entry with the Amtrak engineering department. The agreement was signed off on by the project manager at DOT headquarters and an Amtrak Vice President and their Chief Engineer. The engineering details of the agreement were Amtrak's driving concern. At NJDOT, the Director of ROW and Access Management has the right of approval, but the Attorney General is required to review all "contracts" between the DOT and others. The final document was a joint effort, the result of an iterative process between NJDOT /Amtrak lawyers and engineers.

Appraisals are conducted using either in house or contractor appraisers and are not a barrier to the process. For NJDOT, negotiating the engineering agreement is the primary challenge to the

process. Once the engineering aspects are ironed out ROW is not a problem, and the dollars and cents generally work out simply.

Agreement Documents

NJDOT does not have a "standard" agreement document. In general, NJDOT only gets easements (temporary and permanent).

Fees and Compensation

NJDOT pays for Amtrak to review construction plans and pays for flagmen, security, etc. This is considered as a cost of doing business. These costs are negotiated by the project manager, not by the ROW people and most costs are not real estate costs. There were no rental fees for easements.

Schedule

NJDOT had had a project with CSX that did involve a fee taking. This required a 1 ½ to 2 year process of engineering discussions and design. The ROW negotiations fell within this window.

New York

Process

New York is an "appropriation state", a power rooted in the State constitution. New York "appropriates" property via a map. They file a plot map showing the property and type of interest to be appropriated at the county clerk's office and then NYSDOT acquires it. There is no court procedure as in eminent domain takings, it is a ministerial action. The same procedure applies for a temporary easement, permanent easement or fee acquisition. Any contest to the appropriation goes through the New York State Court of Claims.[4]

NYSDOT provides a copy of the "map", the notice of appropriation, and a full set of design plans, if requested, to Amtrak for each project. In the case of the two projects noted above the property was taken (maps were filed) and money for payment placed on deposit, but payment was not taken by Amtrak. Amtrak is more amicable to friendly appropriation. Sometimes, they go through purchase rather than appropriation.

[4] This is not typical of most States. See *AASHTO 2006 Clearinghouse Report*, Publication No. FHWA-HEP-06-025, May 15, 2006. **EMINENT DOMAIN - 2006 CLEARINGHOUSE REPORT - Realty - FHWA**

"Appropriation" is only used by State agencies in New York. Local governments use condemnation which involves going through a court process if no agreement is reached.

NYSDOT tries to do permanent easements rather than fee taking. In New York ROW must be cleared before any project contracts can be let. NYSDOT works with the railroads to accommodate their needs. However, if Amtrak wants something extra beyond the basic project requirements, Amtrak would have to meet the extra costs.

Indemnification always comes up as an issue, but the basic engineering/design process itself is not a problem.

Agreement Documents

They do not use one general purpose agreement. "Clauses" are added/dropped as required for the specific project. They used the term "customized" standard agreement.

Fees and Compensation

The Amtrak review of plans is considered a legitimate project expense as it is part of the cost of acquisition, and is absorbed by NYSDOT. This is usually not an issue since the dollar value is only a small part of overall project cost.

"Force accounts" are used to fund flagman and other railroad personnel involved in a project. NYSDOT prefers to use force accounts and has not gone in the direction of using its own flagman although it has been suggested. Force accounts are handled through the rail group in NYSDOT not by the ROW group.

Schedule

The State Attorney General recommends a 12-month lead time for ROW issues if no relocation is involved, and 24 months if relocation is involved.

Pennsylvania

Process

The Chief of the Utilities and Right-of-Way Section and a legal staff person negotiate the real property-access agreements. The agreement gives PennDOT whatever interests it needs to construct, operate and maintain. In normal highway projects, the Public Utility Commission (PUC) can use their power to show a public interest in a property, condemn, set a price/value on a property, and then the owner can either accept it or sue. Usually it's easy to reach agreement.

The agreement can involve an easement (temporary construction or aerial[5]), or a quitclaim deed. PennDOT does easements rather than acquisitions because of title problems in acquisitions.

[5] Air rights.

Transactions with Amtrak are almost all easements. They have never gone to court with Amtrak, but had to with CSX and Conrail.

The grade crossing engineer and a legal staff negotiate the project reimbursable agreement. The agreement is the construction contract. It covers all the project specifics, including payments, force accounts, insurance limits, known environmental issues and responsibilities, provisions for on-going inspection, maintenance and repair, and various access and indemnification terms to be covered in Amtrak's contract with the State contractor that will be doing the work.

The indemnification issue can become somewhat contentious, but for the most part the negotiations can be characterized as a typical back-and-forth process over exact terms and language until a consensus is reached.

In addition and as specified in the project reimbursable agreement, the contractor doing the work negotiates and executes a right of access (entry) agreement that has insurance and indemnification provisions. There is also an agreement is between PennDOT and the contractor.

2.3.2 Amtrak

Amtrak requires two basic types of agreements to be in place In order for States to gain access to its property.

1.) Real Estate Agreement – This document includes real estate agreement details, insurance, and indemnification. The purpose of this agreement is to give States the right to occupy for construction/permitting processes.
2.) Engineering Agreement- This document includes design and oversight for railroad protection while work takes place. The purpose of this set of agreements is to serve as a vehicle for Amtrak to provide services to the State and receive compensation.

Amtrak would prefer to have everything in one master agreement. But generally progression is from a design review work agreement, then to a "force agreement." Also, there are sometimes site access agreements or preliminary engineering agreements, which are done separately. The preliminary engineering agreements can be a way of allocating liability for cleanup if a discovery is made that requires remediation.

Amtrak requires contractors to sign a permit to enter, so they have direct contractual privity with the party out on the property completing the work. Also, while the above agreements give States the right to hire a contractor, Amtrak also enters into a direct agreement for entry, insurance and indemnity with contractors.

A force account agreement generally exists for Amtrak to be paid for its work. Amtrak provides an estimate for design phase/preliminary engineering agreement design review and receives compensation for reviewing plans through an executed agreement. The only engineering or real

estate agreements for which Amtrak charges a fee are temporary permits to enter, which have an administrative and application fee of $750.

Once all of the offices have agreed, the agreements are sent to their counterparts at the State. The process is iterative. Once the State agrees the agreement gets sent through the Amtrak Executive Committee level. After an opportunity to ask and address questions, Amtrak performs sign off and sends the agreement(s) to the State for signature.

For real estate agreements, the party responsible for signing and approval varies. Sometimes the President of Amtrak signs, sometimes the Assistant Vice President of Real Estate. In almost all of projects the Assistant Vice President of Real Estate signs. Board approval may be required for major projects depending on the dollar amount.

Engineering agreements, except permits to enter, are signed by the President of Amtrak. Permits to enter are delegated to Deputy Chief Engineer of Construction.

2.4 Observed Impediments and Problems

2.4.1 Highway Agencies Point of View

A number of major topics surfaced during the course of the interviews. Some of these are points of contention, such as liability, indemnification and environmental issues. One may be as much a point of confusion as it is a point of contention. This is Amtrak's status under a State's eminent domain power. The other surprisingly enough appears to be a non-problem. This is reaching agreement on the property's appraised value.

Appraisal[6]

ConnDOT reported that appraisal was an issue in the New Britain-Hartford Bus way project, but that this was not a major stumbling block for the project. Settling on the final figure did not seem to have been a contentious or acrimonious process.

[6] Federal regulations require an appraisal as part of the normal ROW acquisition process (49 CFR Part 24 §24.102 (C) (1)) with exceptions to this requirement noted in §24.201(c) (2).

The requirements for real property acquisition appraisal for Federal and federally-assisted programs are set forth in §24.103. Appraisals are to be prepared according to these requirements, which are consistent with the Uniform Standards of Professional Appraisal Practice.

Qualifications of appraisers and review appraisers are specified in §24.103 (d)

All appraisal/appraisal review cost are an eligible expense for federal-aid funding as part of the acquisition cost.

During negotiation, ConnDOT made an offer for compensation. Amtrak had two appraisals prepared. ConnDOT reported that the Amtrak appraisal estimates included the value of damages associated with approximately 10 billboards. The billboards were on Amtrak property and collecting rent. This billboard assessment was the biggest point of difference.

ConnDOT had no problems with the validity and methodology used by the Amtrak appraisers and said that it came down to a matter of opinion because the different estimates were based on different assumptions and adjustments. ConnDOT felt confident in the estimates prepared by both sides, and both parties agreed that compromise would be best.

The administrative settlement process involves thorough review. They noted that the settlement had to be approved by an independent review board in Connecticut (State Property Review Board).

Neither MBTA nor MassDOT raised appraisal as a contentious area of the real estate agreement process.

For NJDOT, negotiating the engineering agreement is the primary challenge to the process. Once the engineering aspects are ironed out the ROW component is not a problem, and the dollars and cents generally work out simply. Appraisals are conducted using either in house or contractor appraisers and are not a barrier to the process. The office of real estate will bid appraisers, select the lowest bidder, and have them conduct a full appraisal to use in the offer to Amtrak.

In New York an appraisal is used to determine a property's full market value, its highest and best use. NYSDOT will use specialty appraisers if necessary, depending on the project. Sometimes they have to do two appraisals, depending on dollar value. There is a term agreement with a list of appraisers, but they can go off-list if a specialty appraiser is needed. If Amtrak is not satisfied with a monetary offer they can always go to the Court of Appeals. Money has not been an issue in acquiring property from Amtrak and Amtrak has never challenged NYSDOT in court.

In Pennsylvania settling on the payment for the easements seemed straightforward and not contentious. The typical appraisal process is used following standard, well-established practices for how to value different cases.

Liability Insurance[7]

For the most part the States responding on this issue indicated that they were self-insured.

MDOT is self-insured up to $1 million. They noted that Amtrak asks that agreements include provision that MDOT will provide insurance and pay for anything that happens during construction. MDOT felt that they had excess insurance.

NJDOT is self- insured so Amtrak insists that contractors working for the State have their own insurance.

New York State is also self-insured. The liability is taken off the property owner for temporary/permanent easements. NYSDOT has a "claims" unit that handles liability issues, while the AG handles any litigation. Each contractor working for the State has to have their own liability insurance.

Overall, this issue is not as applicable for Massachusetts because MBTA owns the Northeast Corridor ROW. However, they noted that there are provisions in the contracts between Amtrak and MassDOT that deal with the insurance requirements for the Mass Highways contractor. The insurance policy would name MBTA and Amtrak as additional insured parties, and in most cases, CSX because it also operates on the ROW.

Indemnification[8]

In Massachusetts, because MBTA owns the property, MBTA indemnifies Amtrak.

NYSDOT noted that indemnification always comes up as an issue.

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[7] Railroads typically require both General Business Liability Insurance and Railroad Protective Liability Insurance, in amounts from $2 million to $10 million. The need for indemnification is absolute, although the insurance amounts required varies by railroad and occasionally by project type and duration. Contractor indemnification should be considered as a given. In cases where governments have statutory provisions preventing them from indemnifying third parties, the contractors generally are required to accept the indemnification.

Railroads have increased their insurance requirements above the federal minimum levels. The current federal levels include $2 million for general liability and $6 million for Railroad Protective Liability Insurance. Higher limits can be allowed under federal rules with justification.

Strategies for Improving the Project Agreement Process Between Highway Agencies and Railroads, Report S2-R16-RR1, Transportation Research Board, Washington, D.C., 2010.http://onlinepubs.trb.org/onlinepubs/shrp2/SHRP2_S2-R16-RR-1.pdf

[8] Indemnification is the part of an agreement that provides for one party to bear the monetary costs, either directly or by reimbursement, for losses incurred by a second party. To indemnify another party is to compensate that party for loss or damage that has already occurred, or to guarantee through a contractual agreement to repay another party for loss or damage that occurs in the future.

PennDOT self-insures and is prohibited from agreeing to indemnification. The indemnification issue can become somewhat contentious, but for the most part the negotiations can be characterized as a typical back-and-forth process over exact terms and language until a consensus is reached.

PennDOT felt that Amtrak would like PennDOT to waive sovereign immunity.[9] They noted that PennDOT does not want to follow the Rhode Island model on indemnification. They indicated that traditional language on indemnification, which used to work, is no longer acceptable to Amtrak.

In Rhode Island, indemnity was a major issue in gaining access for commuter rail to Amtrak-owned lines south of Providence. This was not directly an FHWA ROW issue, but the principles established seem to have carried over to FHWA ROW cases. The issue was recently settled after about 10 years. It required new legislation to create a "quasi-public agency" to indemnify Amtrak.

A letter of credit is being used for all permanent easements going forward. It applies the commuter rail indemnification agreement to all easement agreements with Amtrak (mostly bridges) and RIDOT needs to institute a new agreement with Amtrak for each new project to rehab a bridge. Amtrak wants RIDOT to provide a $200 million insurance policy to cover risks. It was noted that the P&W railroad has not asked for same level of indemnification as Amtrak.

Environmental Issues

For Connecticut, environmental risk was a major component of their negotiations with Amtrak. ConnDOT did an ESA (environmental site assessment) and found that there were no problems. ConnDOT assumed all responsibility for any existing contaminants, and has accepted the property as is.

Environmental contamination is handled on a case-by-case basis in Maryland. Generally, MDOT is responsible for anything they cause during construction. Amtrak would be responsible for preexisting contamination.

Environmental risk was not raised as an issue by Massachusetts. They own the right of way, so the issue is not applicable.

NJDOT stated that the owner of the property is responsible for cleanup costs of preexisting contamination. NJDOT noted that Amtrak wants the State DOT to assume the risk and pay for any environmental cleanup and indemnify Amtrak of all risk as part of any access agreement.

[9] Sovereign immunity is a judicial doctrine that prevents the government or its political subdivisions, departments, and agencies from being sued without its consent. The doctrine stems from the ancient English principle that the monarch can do no wrong.

On environmental risk, NYSDOT stated that they will not assume liability for toxic substances outside of project boundaries. The Attorney General will not allow it. Amtrak has accepted this position on a case-by-case basis thus far, but does not accept it as a blanket position. If a site is risky NYSDOT will do a permanent easement rather than a fee taking.

The solution PennDOT has reached on indemnification is for PennDOT to take responsibility for clean-up of known problems and responsibility for unknown problems up to a relatively low dollar limit. Costs above the dollar limit are the responsibility of Amtrak, but PennDOT pays Amtrak a "risk fee" for assuming this responsibility. Some of the "risk fee" is refunded if no costs are incurred. The "risk fee" is not a reimbursable cost by FHWA. The Attorney General does not permit PennDOT to buy insurance, so the "risk fee" solution is a creative way to meet the needs of Amtrak and PennDOT given the legal constraints. The one concern PennDOT expressed is that Amtrak will not provide information on how the "risk fee" is set.

Rhode Island noted that Amtrak wants them to assume responsibility for all environmental concerns related to a project, and to be taken out of PRP (potentially responsible party) status.[10] RIDOT indicated that Amtrak wants the States to be responsible for environmental cleanup and wants 100% risk transfer on acquisitions/easements even beyond the boundaries of the project. They also noted that FHWA will not pay for environmental risk fees and that no one knows how Amtrak determines the risk fee. They would like FHWA to pay for the risk fee.

Amtrak Status Under Eminent Domain

ConnDOT did not feel that they could acquire the property they needed from Amtrak for the bus way project through condemnation because of Amtrak's status. Amtrak has to agree to allow their property to be acquired through condemnation. ConnDOT didn't feel that they had concurrence from Amtrak to go about it in that fashion and didn't want to pursue the issue in the courts.

ConnDOT's position regarding their inability to condemn against Amtrak was predicated on the opinion of their legal counsel via the Connecticut Office of the Attorney General. It was determined that based on the level of impact on Amtrak's property that Amtrak could and most likely would appeal the condemnation action for the bus way..

This appeal would likely be based on a claim that the condemnation action frustrates Amtrak's ability to accomplish its Federal mandate of creating and maintaining a national passenger rail system. Case law appears to support this position (Union Ctr. Redevelopment Corp. v. AMTRAK, 103 F.3d 62 (8th Cir, 1997)). They have condemned against Amtrak in the past (without their objection) on smaller acquisitions.

[10] PRP - Potentially Responsible Party terminology is from CERCLA (Superfund Act).

MDOT never had an issue with Amtrak resulting in the need to use eminent domain. This has also never been an issue with other railroads, utilities or government entities.

In the case of MassDOT, because Amtrak is a tenant "Amtrak can't say no."

NYSDOT indicated that Amtrak does not recognize NYSDOT's ability to appropriate for its highway projects. They noted that Amtrak does not seem to want to set a precedent on ceding their "Federal" authority and recognizing the State's right to take their property. NYSDOT has not had similar problems in dealing with CSX on ROW access issues. Private railroads recognize the States' authority to take land in the public interest. NYSDOT has consulted the FHWA division office regarding their doubts about Amtrak's status.

The New Jersey Attorney General told NJDOT that it cannot condemn property of any railroad (e.g., CSX along with Amtrak) without their permission because of interstate commerce issues (the commerce clause), which implies a one way street in negotiations with rail roads.

In typical highway projects, the Pennsylvania Public Utility Commission (PUC) can use its power to show a public interest in a property, condemn, set a price on a property, and then the owner can either accept or challenge. In the past the PUC would "notice" Amtrak, and Amtrak would not oppose the PUC order. More recently, Amtrak has taken the position that Federal law preempts the PUC if there is an impact on operations. Amtrak claims to have acquired special rights when created giving Amtrak "Federal preemption." This is the difference between Amtrak and the freight railroads. PennDOT now does not seek to use this approach, and as a result perceives itself to have less leverage in negotiating the various agreement terms. However, PennDOT perceives that it does have some leverage because Amtrak has requested its cooperation with agreements for projects involving the upgrading the Keystone Corridor between Harrisburg and Philadelphia.

Other Challenges

ConnDOT indicated that a lot of time was spent on the language of the operating agreement. Amtrak sought an agreement that would have no impact on their operations or liability. Reciprocity became a major issue. Amtrak wanted certain protections, and ConnDOT also wanted to guarantee protections for the State.

MDOT felt that the process takes too long because things tend to sit around on the back burner at the railroad since the project is usually not a top priority for the railroad.

One of the recommendations NJDOT provided was to get the railroad's early involvement in the process in order to keep the project on schedule, e.g., can you build a bridge in 3 hour increments if Amtrak says that you can only work on the project between 3am and 6 am? NJDOT also believes that separating the real estate agreement from the engineering agreement would speed up the process.

RIDOT noted that even if an easement is in place, if a force account agreement is not executed, Amtrak will not allow RI DOT onto the property. Coordination is a problem.

2.4.2 Amtrak Point of View

Appraisal

Appraisal is generally not a contentious part of the negotiation. Any real estate transaction, whether for permanent or temporary easements (exclusive or non-exclusive), air space, or a fee exchange, is done at a fair market value that is determined by an independent fee appraiser. Established standards exist for appraisers to determine value of any type of property interest. Sometimes Amtrak will accept the State's appraisal and not have its own conducted, other times it will also have an appraisal done. If both parties' appraisals are different, a final number will be reached through reconciliation.

Liability

Amtrak discussed three areas of liability insurance that are relevant for a project construction phase.

1.) State-provided insurance for State employees: There are liability issues related to active construction sites. Amtrak said that States are either self-insured or have sovereign immunity and therefore do not carry insurance. If a State has the authority to indemnify and is willing to use it, Amtrak has the State use that option, and Amtrak provides safety training.

    If a State does not have legal authority to indemnify or has the authority but will not exercise it, Amtrak may limit access of State employees to occasional and accidental and require training and accompaniment by an Amtrak employee whose time would be paid for by the State. Amtrak's reason for limiting access is if that State employee were to be injured, he or she could sue Amtrak for any amount.

2.) Coverage for Amtrak forces: Amtrak generally self-insures for force account insurance up to $10 million. The cost is charged to the State as part of the cost of the project as a flat fee based on similar commercial insurance rates. Amtrak has excess insurance over that amount. The statutory liability on injuries to passengers of $200 million does not include workers or third parties.

3.) Insurance for contractors/construction workers: Insurance for contractors of the State is handled through the permit to enter. Amount of insurance varies depending on size, type, and risk of the project and what is created but is not subject to negotiation. This is a line item in force account agreement. Amtrak noted past occasions where a State has hired contractors without enough insurance due to outdated contracts, contracts put out to bid before Amtrak estimate, etc.

The levels of insurance are not typically contentious. Generally, negotiating challenges relate to the broader issues of indemnification.

Indemnification

The sovereign immunity issue is a one of the major ones and of great concern to Amtrak. From Amtrak's point of view, the project agreement process would be facilitated by every State having legislation enabling them to indemnify. Amtrak noted that Rhode Island created the Rhode Island Rail Corporation to take on liability that RIDOT can't.

From Amtrak's perspective the two fundamental problems for project agreements are really:

- Indemnification
- Environmental Liability

Environmental Issues

In the past, Amtrak did not protect itself from the environmental liability it would face if contamination were found when it allowed other parties on its property. If the contamination is buried on a property but is not known about, it is not a liability. However, if a contaminant is found, depending on the State, it may have to be reported to the State's environmental protection agency. In some cases, the landowner may be responsible for cleanup, or even researching to figure out how far the contamination extends, and then developing a plan to remediate.

Amtrak noted that this has happened in the past and it is trying to develop a way to protect itself from this risk in the future. Recently an internal policy was developed and explained to all States. Amtrak believes that States are resistant to accepting this policy because they see it as a new cost that Amtrak is seeking to allocate completely or partially to them.

Amtrak's perspective is that they are trying to allocate liability for real risk that has cost them money in the past. Some States don't want to assume responsibility for cleanup, because they say it is Amtrak's liability. Amtrak believes that it is a "but for" issue because "but for" the State's activity the liability would not have existed.

Once, Amtrak was able to procure insurance for environmental liability, but contaminants were found and the insurance company had to pay. Since then, Amtrak has not been able to get this type of insurance.

Amtrak's first choice would be for the State to indemnify Amtrak, which also works well for the State if nothing is found. The advantage of indemnification is that it avoids negligence-based allocations of liability. If there is a clear demarcation of liability that is not fault based, costs are reduced, litigation avoided, and matters resolved in less time.

For States that can't or do not want to indemnify Amtrak for this risk, Amtrak has tried to come up with alternate tools to try to spread costs. The main tool is an environmental risk fee/risk cap

that establishes an upfront cost in which the State will take the first $X in risk. Amtrak will take all liability above that for a one-time fee.[11] Amtrak tries to set risk fees and caps based on prior experience with this type of risk and the cost of insurance that might cover that risk. However, Amtrak noted that insurance coverage of that sort doesn't really exist.

Amtrak Status Under Eminent Domain

Amtrak believes it is exempt from State eminent domain based on U.S. District Court cases. (This was also noted by ConnDOT.) Amtrak is chartered under D.C. law, has considerable involvement from the Federal government, is performing congressionally mandated goals and services, and the Federal government has a mortgage on Amtrak property. It noted that if a State were able to condemn Amtrak property, it would interfere with Amtrak's public service purpose.

Other Challenges

Amtrak and the State are both organizations with significant institutional policies and practices that can make institutional change or flexibility difficult. Amtrak has leverage legally but not politically. Sometimes the State and Amtrak may have conflicting policies or laws. Examples provided were that Amtrak might be asking for something that a State currently cannot legally do, or the State may provide a contract with boiler plate language that Amtrak may consider violates the Federal laws it must follow (e.g., Buy America Provision) or is a policy Amtrak does not want to agree to (e.g., agreement that any cases will be heard in a specific State's court).

Another example provided was of one State that had a written policy that the State DOT could not pay a consultant more than $20 per hour and would include that clause in contracts. For flagging typically it was fine, but if Amtrak would have to hire consultants for design review it would become a problem. Amtrak was successful in having the State remove it for that particular

[11] In 2006, Amtrak developed an Environmental Liability Policy to protect Amtrak from environmental liabilities discovered when other entities have projects on Amtrak properties. Options for an entity seeking access are:

- Indemnification by the entity
- Insurance to cover cleanup costs that is acceptable to Amtrak
- Payment of a risk fee by the entity to Amtrak to cover potential environmental liability that may be uncovered by the project. Amtrak collects the fee and keeps in reserve for any project that encounters contamination requiring remediation.

Sources: Amtrak 2006 Annual Environmental Report, http://tinyurl.com/3qm7vgc

Amtrak 2007 Annual Environmental Report, http://tinyurl.com/4yrg47q

2008 Railroad Environmental Conference November 4-5, 2008, Spoken Presentation Summaries, Illinois Railroad Engineering Program.
http://ict.illinois.edu/railroad/RREC/pdf/2008%20RREC/2008%20presentation%20booklet.pdf (p. 19)

agreement; however, the State policy is still in place and could potentially become an impediment for a future agreement.

Finally Amtrak noted that there may be delays or no communication from States for months and then Amtrak may hear from the State that it needs a fast turnaround for some aspect of the project, which can make a smooth process more challenging.

2.5 Review of Applicable Federal Regulations

2.5.1 Environmental

Once a SDOT has obtained ROW for its project purposes, it is responsible for any environmental remediation that may be required. This is noted in NCHRP's Studies in Transportation Law.[12]

> After contamination of a construction site is discovered, the transportation agency may, for both practical and regulatory reasons, need to remediate the site to complete its project. Remediation could require paying for the cost of removing contaminated substances from a site or treating or containing contaminated substances at the site. Both the type of contamination and applicable Federal and State remediation requirements will guide how the contaminated substances are handled.
>
> When a transportation agency is required to remediate a site to construct a transportation improvement, an environmental agency may require additional excavation beyond the limits of the originally planned area needed for transportation purposes. To the extent that more contaminated soil is exposed as a result of this expanded site work, further remediation may be required. The need to "chase" additional contamination outside the bounds of the planned transportation improvement to satisfy regulatory cleanup obligations may add significantly to the cost of a project and delay its completion.

Under current Federal regulations environmental cleanup costs are reimbursable and considered a legitimate project expense. To be eligible for Federal-aid reimbursement, the costs must be allowable under the Federal cost principles. The key in this case is that they must be allocable to the project; the cleanup work must have a benefit to the Federal-aid project and be necessary for constructing the project. Costs would have to be "reasonable and necessary." There are no dollar limits. Limits would be based on programmed cost for the project or lack of additional funding

[12] *Selected Studies in Transportation Law, Volume 3, 2010 Supplement, ENVIRONMENTAL LAW and TRANSPORTATION*, National Cooperative Highway Research Program, Transportation Research Board, The National Academies, Washington, DC, 2010, p.5-4.

The SDOT may pursue identified PRP's in order to recover remediation costs. This is the source of the major point of contention in SDOT dealings with Amtrak since Amtrak would be the PRP. The issue of who is responsible would go back to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Superfund Amendments and Reauthorization Act (SARA). Other State laws may assign responsibility to the polluting entity for cleanup costs within the project boundaries and beyond the project boundaries. The SDOT would recoup these costs from the polluter where laws exist to allow this. Any environmental cleanup cost that couldn't be avoided would be a typical project cost.

2.5.2 Liability Insurance

Requirements for liability insurance for State agency contractors are specified in 23 CFR 646 Subpart A – Railroad-Highway Insurance Protection. Contractors who work on railroad rights-of-way are required to have public liability and property damage insurance to cover not only the railroad but also any other damages that may occur as a result of the project (23 CFR 646.105). Types of coverage are discussed in §646.109 with amount of coverage discussed under §646.111. Cost of coverage is a legitimate project expense subject to limits as described in §646.111. Higher dollar amounts of coverage for which premiums will be reimbursable from Federal funds shall be allowed. These larger amounts will depend on circumstances and shall be written for the individual project in accordance with standard underwriting practices upon approval of the FHWA. (§646.111(b))

In 23 CFR 646.111(a), the liability limit is set at $2 million per occurrence, with an aggregate amount of $6 million for aggregate damages in a year. The Code of Federal Regulations indicates these limits were last updated in 1982. Railroads routinely demand much higher liability limits from highway agencies. This creates several issues. The highway agency must use State funds to pay for the coverage or it must seek case-by-case Federal exemption to pay the higher limits. The case-by-case exemption can add additional time to the project-development process, especially if the highway agency or FHWA believes the insurance requests to be excessive. It is generally agreed that the 1982 limits in 23 CFR 646 are low by current insurance standards.

Insurance coverage for the SDOT is not addressed in 23 CFR 646 Subpart A. State laws may provide for "self-insurance" and most states have "sovereign immunity" laws so cost of coverage for liability insurance for the State itself is not an issue.

Congress also established liability provisions in the Amtrak Reform and Accountability Act of 1997 (ARAA). Specifically, the act limits the aggregate overall damages that may be awarded to all passengers for all claims (including punitive damages) from a particular rail accident to $200 million. The act also permits Amtrak and other providers of rail transportation to enter into indemnification agreements allocating financial responsibility for passenger accidents.

However, there are limitations to the protection the legislation provides. The legislation does not limit damages for claims brought by non-passengers. For example, the legislation would not apply to claims brought by adjacent property owners or populations that may be harmed in a hazardous materials spill or an accident at a rail crossing. (Pub. L. 105-134, § 161 (1997); 49 U.S.C. § 28103)[13]

[13] *Commuter Rail: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations*, GAO report number GAO-04-240, January 30, 2004.

3 Conclusions

The major purpose of this research was to identify barriers to the agreement process and to propose remedies to effectively use strategies and institutional arrangements to facilitate beneficial relationships between railroads and public agencies.

3.1 Areas Identified as Requiring Improvement

Major concerns and points of contention revolve around indemnification in general, the assignment of environmental and other risks, and related financial payments.

The sovereign immunity issue is one of the major ones and of great concern to Amtrak. From Amtrak's point of view, the process would be facilitated by every State having legislation enabling them to indemnify. The major concern here is related to environmental risk.

The cost and availability of protective liability insurance can be an issue, since the reimbursable insurance limits set forth in current Federal regulations may be insufficient.

The price of the easement/acquisition has not been a contentious issue. The major issue in ROW acquisition is not money/price but State rights vs. Amtrak's "Federal" right in ROW acquisition. There seems to be uncertainty as to what rights Amtrak has under its Federal charter.

The last area identified as needing improvement revolves around the simple mechanics of the process. It may be stating the obvious, but coordination on projects is very important.

- **There is a need to get early railroad involvement in order to keep the project on schedule.** Failure to understand railroad requirements and to anticipate construction issues can result in delays. (e.g., is it possible to build or rebuild a bridge in 3 hour increments if Amtrak says that you can only work on the project between 3am and 6 am?)

  The details of the engineering/operating agreements are the major stumbling blocks and source of delay, not ROW issues. Separating the ROW agreement from the engineering agreement would simplify and speed up the ROW process but not necessarily the overall process.

- **There is a need for advance agreement on a schedule for the timely review of documents.** Some SDOTs felt that the process takes too long because things tend to sit around on the back burner at Amtrak, since usually the project is not a big priority for the railroad. Amtrak noted there may be delays or no communication from States for months and then Amtrak may hear from the State that it needs a fast turnaround for some aspect of the project, which can make a smooth process more challenging.

An agreed-on series of coordination steps with agreed-on timelines theoretically is possible. It would appear possible for Amtrak to anticipate the needed review workload, if the SDOTs could provide Amtrak with a firm schedule of which projects will be referred to Amtrak over the course of the next year.

- **All required documents must be executed at the proper time.** One SDOT noted that even if an easement is in place, if a force account agreement is not executed, Amtrak will not allow them onto the property.

- **Standard boiler plate in agreements needs to be up to date.** Amtrak noted for example that one State had a written policy that the SDOT could not pay a consultant more than $20/hour. For flagging typically it was fine, but if Amtrak would have to hire consultants for design review it would become a problem. Amtrak got the State to remove the wording for one agreement, but the State policy is still in place and could potentially become an impediment again for a future agreement.

3.2 Suggested Next Steps

The next step in the process is to share the results of this research with the stakeholders within the NEC, both SDOT's and Amtrak, in order to highlight the shared concerns and problems identified by the participants, and provide an additional forum for further comment.

Conduct stakeholder web conference - In order to meet this objective FHWA should organize and conduct a web conference (a "webinar") with representatives from SDOTs within the NEC, FHWA Division offices, Amtrak and FHWA Headquarters personnel that participated in the interviews or the webinar conducted as part of the research. Personnel from the effected agencies who have experience in the subject matter, but who could not participate in the original webinar or interviews would also be invited.

The issue of indemnification and sovereign immunity is too big of a problem for FHWA to handle on its own. Ultimate resolution would require the passage of special legislation in each of the States and perhaps even amending State constitutions. However, FHWA could pursue a couple of avenues to make the liability issue less of a problem in negotiations between Amtrak and the State DOT's.

Review contractor liability limits in the CFR - Conduct a review of limits and requirements for liability insurance in 23 CFR 646 and update as required. It is generally agreed that the 1982 limits in 23 CFR 646 are low by current insurance standards. More realistic limits would eliminate the need for SDOTs to seek case-by-case Federal exemption to pay the higher limits, and remove a potential sticking point from their negotiations with Amtrak. The need to apply for

case-by-case exemptions can add additional time to the project-development process and places an additional burden on all parties including FHWA.

It was learned that the FHWA Office of Program Administration had looked into this problem three years ago in response to complaints from the State of Alabama and the railroad industry. They had attempted to get data to support requests for higher limits, but were unsuccessful. They let the matter drop because they had no data to support a Regulatory Impact Analysis that would be required to support a proposed rulemaking.

Short of doing a Regulatory Impact Analysis and a formal rulemaking, FHWA could do an internal poll of the Division Offices as a first step in addressing this problem. The Division Administrators review the waiver requests, and grant or deny the requests. The results of this poll would allow one to determine how many waiver requests are received, how many are granted and denied, what are the dollar values of the individual requests, and what level of effort is involved in reviewing these requests. The results of this effort would determine whether or not the issue should be pursued further through a formal rule making by providing data on how many waiver requests the Division Offices actually process. It may also be an indirect way of getting at an appropriate level for increased limits given that the waiver requests should be a reflection of what the railroads feel is an appropriate level for liability coverage at current prices.

Explore the concept of the "environmental risk fee" - Look into the "environmental risk fee" proposed by Amtrak and used by PennDOT as a way of getting around the indemnification issue associated with responsibility for environmental cleanup costs. FHWA could meet with Amtrak to determine the details of their approach, and meet with PennDOT to get further details on their experience in negotiating the fee with Amtrak and their reasons for accepting the fee and paying for it without being reimbursed by FHWA. If it was found that the concept was worth pursuing, FHWA could then determine what would be required to revise current Federal regulations in order to make this a reimbursable project expense. The SDOTs did not appear to be opposed to an "environmental risk fee" but were more concerned about the details of how the fee was set and the fact that if they accepted Amtrak's offer they could not be reimbursed for its cost under current Federal regulations. Solving this problem would eliminate the major point of contention between the SDOTs and Amtrak surfaced in this research and get this issue off the table once and for all.

Sponsor legal research on Amtrak/railroad status relative to the States' eminent domain powers - Sponsor a modest effort of legal research on Amtrak's Federal status relative to the States' eminent domain powers and distribute the findings to SDOTs. This could serve to delineate those cases in which Amtrak enjoyed immunity because of its Federal status from those (if any) where it's Federal status did not apply. This effort could and should be extended to railroads in general, in order to provide SDOTs with a clear understanding of those circumstances where STB approval is or is not required in the attempted taking of railroad property. This would serve to eliminate confusion and uncertainty among the SDOTs. While this

effort surfaced some general conclusions on Amtrak's status relative to a State's eminent domain powers, developing the final word on this topic was beyond our scope.

Sponsor annual meetings between the SDOTs and Amtrak - Finally, in order to improve the mechanics of the process, it is suggested that FHWA facilitate and sponsor annual meetings between the SDOTs and Amtrak. While some States have initiated regular meetings with Amtrak, this does not seem to be a common practice.

The purpose of such meetings would be to discuss big-picture issues and to work toward establishing a common understanding of important areas, and then to agree on the mechanisms and processes to ensure successful execution of projects.

A high-level checklist of items to be considered at the meeting includes the following:

- Share communication protocols and contact information of personnel from both sides.
- Discuss issues and their resolution related to current projects and the previous year's projects.
- Discuss processes and resolve any issues related to insurance, billing, or reimbursements.
- Share information about anticipated projects for the coming year.
- Set deadlines and expectations and timeframes for review and approval, and establish a process for the regular communication of the status of projects and agreements.

The latter could be incorporated into a memorandum of understanding between each SDOT and Amtrak as to how they desire to conduct the review process.

Appendix A. Amtrak Interview Summary

Date

February 24, 2012

Participants

Tom Moritz, Commuter Group
Mike Stern, Legal Office
Gail Trackenberg, Legal Office
John Wood, Real Estate Office

Discussion Guide

Experience with State DOT-Highway Projects

1. What types of projects with State DOTs have recently occurred? We are especially interested in projects involving access to Amtrak property in the NEC.

2. What specific real estate rights and interests were requested? Fee simple? Permanent easement? Temporary Construction Easement? Lease? License? Right of Entry?

3. For what purpose? (for example grade separations, grade crossings, bridge replacements)

Negotiating Agreements

4. What specific real estate rights were actually secured by negotiation? (How did these differ from those requested?)

5. If an option exists, what type of agreement does Amtrak prefer, i.e., easement vs. lease vs. fee simple acquisition?

6. Does Amtrak have one section or organizational unit which specializes in real estate/right-of-way conveyances to government agencies? (Are legal aspects handled by local legal staff or Chief Counsel's office?)

7. Who was involved in negotiations
    a. What departments, agencies, offices from the State?
    b. What departments from Amtrak?

8. Do you have a formal project oversight committee within Amtrak for facilitating project negotiations and/or the monitoring of on-going projects and agreements? If so, how and

when was it created? Who (position-title) are its participants? Please describe its functions and comment on its effectiveness.

9. Does Amtrak have a master agreement or standard clauses for access to Amtrak ROW? If so, how was it or they created? What are their general provisions? What is not covered and must be added for specific projects?

10. Are there existing master agreements with any States? Did the States propose the use of their own standard conveyance documents? If so, was this problematic? Discuss.

11. Have any States used their condemnation-eminent domain rights to gain access to Amtrak property?

Approval Process at Amtrak

12. How does the agreement approval process work at Amtrak?

13. How many different departments must sign-off on or approve a real estate transaction? At what level of management are the documents signed? Does it vary by type of transaction?

Appraisal & Compensation

14. Did Amtrak request or require compensation for the real estate rights conveyed?

15. Was the compensation requested by Amtrak for the rights conveyed, determined by an appraisal, fee schedule or some other method? Does your organization perform appraisals of railroad takings using "in-house" appraisers?

16. Does Amtrak charge the DOT an application fee and/or document preparation fee? If yes, what was the fee?

17. Have there been any problems in reaching agreement on levels of liability insurance?

18. Have you used force accounts to compensate for Amtrak staff used on such projects? If so, what activities were covered by the force account? Was a separate agreement executed for the force account or was it part of a broader access agreement? Please describe its general provisions and the negotiating process. Can you provide a copy? How did any issues with force accounts get resolved?

19. Has environmental risk mitigation been an issue in projects and agreements with State DOTs? If so, what mitigation measures were adopted? Did your agreement provide indemnification of Amtrak, insurance, an environmental risk fee, or some combination of these? Please describe what was used and its terms, especially who paid for what and how the dollar levels were decided.

Other/General

20. What do you perceive as the primary barriers do you perceive in negotiating agreements with State DOTs?

21. What do you perceive as the primary factors that help facilitate successful negotiations and overcome these barriers?

22. Have you incorporated any lessons learned from past negotiations to agreements moving forward?

23. **Other Comments:** Is there anything else you would like to comment on regarding the negotiation of ROW access agreements?

Amtrak Interview Summary

Project Types

Amtrak has similar types of staged agreements for several ongoing projects in the Northeast Corridor:

- With Connecticut, Amtrak completed a permanent easement for a ConnDOT bus way in Amtrak ROW. The project will be done in phases so there is a master force account agreement in place for that. The master agreement sets out general payment, liability, insurance, and other general business information. When ConnDOT wants to perform specific parts of the work, they will complete a one page form (project authorization letter). Amtrak and ConnDOT are still working on a temporary easement for construction.
- In Rhode Island, where RIDOT was doing work for a new commuter rail station in Wickford. Amtrak sold RIDOT the property for the garage, but provided an easement to build the platform.
- In Rhode Island, they also had a similar type of arrangement for an intermodal facility at TF Green Airport in Warwick. They negotiated a series of agreements to allow building over the track and station adjacent, with a series of engineering force agreements to allow the work to take place.
- There are several ongoing projects with Pennsylvania for reconstruction. Project in Lancaster, PA involves permanent and temporary easements, as well as fee simple acquisitions.

Agreement Process

Process

Amtrak works with many State DOTs and understands that States have to undertake projects to build, operate, and maintain their transportation systems, and negotiates in good faith towards completion. Generally, the “business” parts of the project agreements are agreed to relatively quickly. The issues that lead to more challenging negotiations are liability, insurance, and indemnification.

There is significant coordination across offices within Amtrak. The parties involved are legal, real estate, engineering, risk management, finance, and planning offices.

Internally, the legal counsel takes the lead and drafts the agreements. The legal and real estate offices work together to ensure the real estate and engineering agreements are consistent. Throughout the process, the appropriate offices are given the opportunity to comment. For the real estate agreement, the Amtrak legal office signs of as approved to form and legality, not always for content.

Once all of the offices have agreed, the agreements are sent to their counterparts at the State. The point person at Amtrak sometimes depends on who the point person is at the State. Typically a legal counsel is the point person.

The process is iterative. Once the State agrees the agreement gets sent through the Amtrak Executive Committee level. After an opportunity to ask and address questions, Amtrak performs a sign off and sends the agreement(s) to the State for signature.

For real estate agreements, the party responsible for signing and approval at Amtrak varies. A signing authority matrix exists, but it is sometimes out of date. Sometimes the President signs, sometimes the Assistant Vice President of Real Estate, sometimes a board approval process is necessary.

Engineering agreements, except permits to enter, are signed by the President. Permits to enter are delegated to the Deputy Chief Engineer of Construction. In 99% of projects, the Assistant Vice President signs real estate agreements, and the President signs engineering agreements.

Existing relationships with States and prior experience working together facilitates the process. With some States there are templates they are comfortable with that they work from.

Amtrak has started a project in the law department where they keep track of deadlines in a computer program to make sure they do things in a timely fashion.

Deadlines set in advance, and realistic expectations and timeframes for review, approval, and regular communication of the status of projects and agreements would remove uncertainty and keep things moving through the process smoothly. Some States make sure Amtrak is kept up to date.

Amtrak does not want to be in the position of saying no, so it seeks to be flexible within its parameters, and sees itself as a partner in a number of projects with many State DOTs. It also noted that States are going to be more involved in running the Northeast Corridor under PRIAA.

Agreement Documents

Amtrak requires two basic types of agreements to be in place in order for States to gain access to its property.

1.) Real Estate Agreement – This document includes real estate agreement details, insurance, indemnification. The purpose of this agreement is to give States the right to occupy for construction/permitting processes
2.) Engineering Agreement- This document includes design and oversight for railroad protection while work takes place. The purpose of this set of agreements is to serve as a vehicle for Amtrak to provide services to the State and receive compensation.

Amtrak would prefer to have everything in one master agreement. But generally progression is from a design review work agreement, then a "force agreement." Also, sometimes there are site access agreements or preliminary engineering agreements, which are done separately. The preliminary engineering agreements can be a way of allocating liability for cleanup if a discovery is made that requires remediation.

Amtrak requires contractors to sign a permit to enter, so they have direct contractual privity with the party out on the property completing the work. Also, while the above agreements give States the right to hire a contractor, Amtrak also enters into a direct agreement for entry, insurance and indemnity with contractors.

Schedule

There may be delays or no communication from States for months and then Amtrak may hear from the State that it needs a fast turnaround for some aspect of the project, which can make a smooth process more challenging.

Appraisal

Appraisal is generally not a contentious part of the negotiation. Any real estate transaction, whether for permanent or temporary easements (exclusive or non-exclusive), aerial rights, or a fee exchange, is done at a fair market value that is determined by an independent fee appraiser. Established standards exist for appraisers to determine value of any type of property interest. Sometimes Amtrak will accept the State's appraisal and not have its own conducted, other times it will also have an appraisal done. If both parties' appraisals are different, a final number will be reached through reconciliation.

Fees and Compensation

A force account agreement generally exists for Amtrak to be paid for its work. Amtrak provides an estimate for design phase/preliminary engineering agreement design review and receives compensation for reviewing plans through an executed agreement. The only engineering or real estate agreements for which Amtrak charges a fee are temporary permits to enter, which have an administrative and application fee of $750.

Liability and Indemnification

Amtrak discussed three areas of liability insurance that are relevant for a project construction phase.

1.) State-provided insurance: There are liability issues related to active construction sites. Amtrak said that States are either self-insured or have sovereign immunity and therefore do not carry insurance.

If a state has the authority to indemnify and is willing to use it, Amtrak has the State use that option, as well as receiving safety training from Amtrak.

If a State does not have legal authority to indemnify or has the authority but will not exercise it, Amtrak may limit access of State employees to occasional and accidental and require training and accompaniment by an Amtrak employee whose time would be paid for by the State. Amtrak's reason for limiting is if that State employee were to be injured, he or she could sue Amtrak for any amount.

2.) Coverage for Amtrak forces: Amtrak generally self-insures for force account insurance up to $10 million. The cost is charged to the State as part of the cost of the project as a flat fee based on similar commercial insurance rates. Amtrak has excess insurance over that amount. The statutory liability on injuries to passengers of $200 million does not include workers or third parties.

3.) Insurance for contractors/construction workers: Insurance for contractors of the State is handled through the permit to enter. Amount of insurance varies depending on size, type, and risk of the project and what is created but is not subject to negotiation. This is a line item in the force account agreement. Amtrak noted past occasions where a State has hired contractors without enough insurance due to outdated contracts, contracts put out to bid before Amtrak estimate, etc.

The levels of insurance are not typically contentious. Generally, negotiating challenges relate to the broader issues of indemnification. Amtrak and the State are both organizations with significant institutional policies and practices that can make institutional change or flexibility difficult. Amtrak perceives that it has leverage legally but not politically. Sometimes a State and Amtrak may have conflicting policies or laws. Examples provided were that Amtrak might be asking for something that a State currently cannot legally do, or the State may provide a contract with boiler plate language that Amtrak may consider violates the Federal laws it must follow (e.g., Buy America Provision) or is a policy Amtrak does not want to agree to (e.g., agreement that any cases will be heard in a specific State's court).

Another example provided was of one State that had a written policy of the State DOT that it could not pay a consultant more than $20 per hour and would include that in contracts. For flagging typically it was fine, but if Amtrak would have to hire consultants for design review it would become a problem. Amtrak was successful in having the State remove it for that particular agreement; however, the State policy is still in place and could potentially become an impediment for a future agreement.

The sovereign immunity issue is one of the major ones and is of great concern to Amtrak. From Amtrak's point of view, the process would be facilitated by every State having legislation

enabling them to indemnify. Rhode Island created the Rhode Island Rail Corporation because it can take on liability that RIDOT can't.

Environmental Risk

In the past, Amtrak did not protect itself from the environmental liability it would face if contamination were found when it allowed other parties on its property. If the contamination is buried on a property and but is not known about, it is not a liability. However, if a contaminant is found, depending on the State, it may have to be reported to the State's environmental protection agency. In some cases, the landowner may be responsible for cleanup, or even researching to figure out how far extends, then give plan to remediate.

Amtrak noted that this has happened in the past and it is trying to develop a way to protect itself from this risk in the future. Recently an internal policy was developed and explained to all States. Amtrak believes States are resistant because it is a new cost Amtrak is seeking to allocate completely or partially to them.

Amtrak's perspective is that it is trying to allocate liability for real risk that has cost it money in the past. Some States don't want to clean it up, because they say it is Amtrak's liability. Amtrak believes that it is a "but for" issue because "but for" the State's activity, the liability would not have existed.

Once, Amtrak was able to procure this type of insurance, but contaminants were found and the insurance company had to pay. The State is still providing a consultant for Amtrak to try to remove the rest of the liability. Since then, Amtrak has not been able to get this type of insurance.

Amtrak's first choice would be for a State to indemnify Amtrak, which also would work well for the State if nothing is found. The advantage of indemnification is to avoid negligence-based allocations of liability. If there is a clear demarcation of liability that is not fault based, everyone winds up with more money, the process is quicker and it avoids finger pointing at a trial.

For States that cannot or do not want to indemnify Amtrak for this risk, Amtrak has tried to come up with alternate tools to try to spread costs.

The main tool is a risk fee/risk cap that establishes an upfront cost in which the State will take the first $X in risk, and, for a one-time fee, Amtrak will take on all liability above that threshold.

Amtrak tries to set risk fees and caps based on prior experience with this type of risk and type of insurance that might cover that risk. Insurance coverage of that sort does not really exist.

Eminent Domain

Amtrak believes it is exempt from State eminent domain based on U.S. District Court cases. Amtrak is chartered under D.C. law, has considerable involvement from the Federal government,

is performing congressionally mandated goals and services, is beholden to Congress, and the Federal government has a mortgage on Amtrak property. It noted that if a State were able to condemn Amtrak property, it would interfere with the public service purpose.

Appendix B. Summary of State DOT Interviews

Dates/Participants

ConnDOT December 21, 2011

John Randazzo, Division Chief of Acquisitions/Relocations
James Mason

MassDOT February 10, 2012

John Ray, Deputy Rail Administrator

MDOT February 17, 2012

Mark McDonald , Real Property Supervisor, Maryland State Highway Administration (SHA), Office of Real Estate- District 4

NJDOT January 4, 2012

Victor Akpu, Director of Right-of-Way and Access Management
Bob Cunningham, Manager of Technical Support

NYSDOT September 13, 2011

Bruce Davis
Phil Healy

PennDOT March 19, 2012

Mark Chappell, Sup., Facilities and ROW
Bill Cressler, Legal Staff
Gena Delfonso, Legal Staff
Greg Vaughn, Grade Crossing Engineer

Discussion Guide

Experience with Amtrak/Other Railroads

1. Do you have current or past experience negotiating access agreements with Amtrak? Any experience with projects initiated by Amtrak?

Negotiation and Approval Process

2. Generally, how does the agreement approval process work in your State?

3. What is the role of your organization in the agreement approval process?

4. Does your organization have one section which specializes in real estate/right of way acquisition from government agencies, public utilities, and/or railroads? (Are legal aspects handled by DOT legal staff or the State's Attorney General staff?)

5. Does your State have a separate transportation organizational unit focused on railroad infrastructure issues and development, or rail operations? If so, how do the two organizations interact in the planning, negotiation, and implementation of highway projects? Does State DOT management have a unified strategic approach to its dealings with Amtrak?

6. *(Qs. 6- 11 For each project in Question 1)*

7. What specific real estate rights and interests were requested from Amtrak (or other RR)? Fee simple? Permanent easement? Temporary Construction Easement? Lease? License? Right of Entry?

8. For what purpose? (for example grade separations, grade crossings, bridge replacements)

9. Was or will there be an operational impact on Amtrak?

10. About how long did it take to conclude negotiations (from original contact with Amtrak or other RR)?

11. Who was involved in the negotiations
    a. What departments, agencies, offices from your State?
    b. From Amtrak?

12. Was the acquisition from Amtrak or other RR accomplished via one point of contact or was it necessary to deal with numerous RR parties in multiple locations?

13. Did Amtrak or other RR have any specific requests about the documents used for agreement? If so, how did these requests affect the project agreement process?
14. Did Amtrak or other RR require use of their conveyance documents?

15. Were multiple sets of plans requested?
16. Were the operations agreement and conveyance documents separate or combined?

17. Was the DOT's project delivery schedule affected by a longer than reasonably anticipated project agreement process for reaching a negotiated settlement with Amtrak or other RR for the real estate interests required for the project? If so, were additional costs, such as delay claims, incurred?

18. What do you think may be help facilitate the negotiation and approval process negotiations and overcome challenges or barriers in the process?

Communication

19. Do you have a master agreement or standard clauses for access to Amtrak ROW? If so, how was it or they created? What are their general provisions? What is not covered and must be added for specific projects?

20. Do you have a formal project oversight committee with Amtrak for facilitating project negotiations and/or the monitoring of on-going projects and agreements? If so, how and when was it created? Who (position-title) are its participants? Please describe its functions and comment on its effectiveness.

21. What suggestions do you have that might help facilitate communications with Amtrak in the ROW acquisition process and improve the project agreement process?

Compensation

22. Was the compensation requested by the RR, for the rights conveyed, determined by an appraisal, fee schedule or some other method?

23. Does your organization provide appraisers with a specific scope of work on how to conduct the appraisal?

24. Did Amtrak or other RR charge the DOT an application fee and/or document preparation fee? If yes, what was the fee?

25. For any past agreement w/ Amtrak, what were the access fees or other financial provisions, if any? How was the dollar amount determined? Were appraisals done, and if so, by whom? Does your organization perform appraisals of railroad takings using "in-house" appraisers?

26. Did liability issues enter into the agreement process? Was liability insurance required? If there was a liability insurance, requirement, what levels were specified and what do you recall as to how that was determined?

27. Have you used force accounts to compensate for Amtrak staff used on your projects? If so, what activities were covered by the force account? Was a separate agreement executed for the force account or was it part of a broader access agreement? Please describe its general provisions and the negotiating process. Can you provide a copy? How did any issues with force accounts get resolved?

28. Has environmental risk mitigation been an issue in projects and agreements with Amtrak? If so, what mitigation measures were adopted? Did your agreement provide indemnification of Amtrak, insurance, an environmental risk fee, or some combination of these? Please describe what was used and its terms, especially who paid for what and how the dollar levels were decided. Were any such project costs reimbursable by FHWA? Explain.

29. What do you think may be help facilitate agreement on the appraisal or compensation and overcome challenges or barriers in the process?

Other/General

30. Over the last ten years, have acquisitions from Amtrak or other RR become easier or more difficult? Why? What do you perceive as the primary barriers do you perceive in negotiating Amtrak or non-Amtrak rail agreements?

31. What do you perceive as the primary factors that help facilitate successful negotiations for rail ROW access and acquisition?

32. Have you incorporated any lessons learned from negotiating agreements with Amtrak or non-Amtrak railroads to agreements moving forward?
33. Other Comments: Is there anything else you would like to comment on regarding the negotiation of ROW access agreements with Amtrak or other railroads?

State Interview Summaries

Connecticut

Project Types

The main project discussed was the development of a Bus Rapid Transit line. The project involved a 9.5 mile corridor for the planned New Britain-Hartford Bus way and involved temporary and permanent easements.

Agreement Process

Structure/Roles

In Connecticut, the ROW division is responsible for negotiation, acquisition, and relocation across the State for any transportation-related needs. The office does not serve a legal function; instead, the legal arm is the State Attorney General's office, whose involvement is limited to condemnation and litigation. The office is located in the State Department of Transportation in the Highway Bureau, but deals with all transportation ROW issues. Transit projects are also handled by the highway group because the transit group in ConnDOT does not have its own ROW group.

Process

For the bus way project, engineering was the primary focus, though utilities and legal issues were also involved. Because of the complicated nature and engineering of the project, those responsible at the ROW office decided that a team approach would be the best approach to negotiations, and put together a team including engineering, utilities, and legal (staff attorney from commissioner's office) representatives. ConnDOT believed that this approach was an appropriate response to Amtrak's approach to the conveyance documents.

The permanent easements have been executed, but the temporary easements are still in progress. The original approach of ConnDOT was to combine all easements into one transaction and conveyance document, while Amtrak preferred that the temporary and permanent easements be separated. Currently, the two parties are in the process of developing the temporary easement instrument, which is very similar to the permanent easement one, but does not contain information on compensation. Currently, ConnDOT is also still working with Amtrak on issues related to billboards. There is an established deadline for billboard removal that is conducive to the ConnDOT schedule.

Agreement Documents

The conveyance document was primarily an operating agreement. Amtrak preferred the ROW conveyance and operating agreements to be in one document, while ConnDOT preferred them to be separate. The conveyance documents contain detailed information on project activities on Amtrak's property. Amtrak wanted it recorded and on the land record as a permanent document. Amtrak wanted to retain all ownership rights so the property transactions involved only easements, which simplified the ROW problems.

"Damages" (i.e., the compensation paid to Amtrak) are all reflected in the permanent easement documents.

Schedule

The ROW acquisition process started in Oct 2008. The actual agreement was reached in 2010, and signed in April 2011. ConnDOT formally filed the final conveyance documents and provided compensation in November 2011. The temporary easement agreement was still pending at the time of the interview in December 2011. This temporary easement agreement was for construction purposes, and the actual length of time for construction remained to be determined. The timeline is part of what they're working on right now. There are aspects of the project where ConnDOT needs to access property to perform activities on the behalf of Amtrak., but Amtrak would like to have control of certain parts of construction, as there are instrument panels, signal control boxes, etc. that need to be moved out of the way during construction.

A lot of time was spent determining both the operational language and legal language, because the operational and conveyance documents were combined into one.

Amtrak sought an agreement that would have no impact on their operations or liability. Reciprocity became a major issue – Amtrak wanted certain protections, and ConnDOT also wanted to guarantee those protections for the State. ConnDOT indicated that the agreement might have been completed more quickly if it were only a ROW agreement, as coupling the ROW agreement with an operating agreement involved a large number of reviewers on each side. On the Amtrak side, real estate, legal, engineering and operations were involved.

If they were to repeat the experience, they would have facilitated the process by having a smaller group. Another source of delays was the absence of a key decision maker at points in the process, resulting in further delays.

There is a temporary easement for the construction period.

Appraisal

During negotiation, ConnDOT made an offer for compensation. Amtrak had two appraisals prepared. ConnDOT reported that the Amtrak appraisal estimates included the value of damages

associated with approximately 10 billboards. The billboards were on Amtrak property and collecting rent. This billboard assessment was the biggest point of difference.

Settling on the final figure did not seem to have been a contentious or acrimonious process. The administrative settlement process involves thorough review. ConnDOT had no problems with the validity and methodology used by Amtrak appraisers and said that it comes down to a matter of opinion because the different estimates were based on different assumptions and adjustments.

ConnDOT felt confident in both products, and both parties agreed that compromise would be best. They noted that the settlement had to be approved by an independent review board in Connecticut (State Property Review Board).

The funding for the ROW acquisition is part of a Federal Transit Administration (FTA) Full Funding Grant Agreement. FTA in this case assigned responsibility to FHWA and ConnDOT worked through their FHWA real estate connection in Connecticut.

Fees and Compensation

All payments to Amtrak (those associated with both the permanent and temporary easements) are assigned to the permanent easement documents.

Liability and Indemnification

Not discussed as an issue.

Environmental Risk

Environmental risk was a major component of the negotiations. ConnDOT did an ESA (environmental site assessment) and found that there were no problems. ConnDOT assumed all responsibility for any existing contaminants, and has accepted the property as is. Liability insurance costs were covered by the FTA grant. ConnDOT's standard specification for coverage exceeds 23 CFR as they exist. In certain cases, they can exceed amounts with Federal participation.

Eminent Domain

ConnDOT's position regarding the inability to condemn against Amtrak was predicated on the opinion of their legal counsel via the Connecticut Office of the Attorney General. It was determined that based on the level of impact on Amtrak's property that Amtrak could and most likely would appeal their condemnation action for the bus way.

This appeal would likely be based on a claim that the condemnation action frustrates Amtrak's ability to accomplish its Federal mandate of creating and maintaining a national passenger rail system. Case law appears to support this position (Union Ctr. Redevelopment Corp. v. AMTRAK, 103 F.3d 62 (8th Cir, 1997)).

ConnDOT has condemned against Amtrak in the past (without their objection) on smaller acquisitions. Again however, in this instance ConnDOT felt they would strongly object given the extent of the impacts.

Maryland

Project Types

MDOT last dealt with Amtrak in 2007 for a project on the Eastern Shore near Ocean City. In this project, MDOT wanted a permanent easement for aerial rights near U.S. 50 in order to fix an existing bridge over Amtrak ROW. The State already had an easement for the bridge. Amtrak did not want to grant a perpetual agreement and preferred to keep total control of its property, so the final agreement was an entry agreement in order to complete the project. No exchange of money took place.

Agreement Process

Structure/Roles

In Maryland, districts are responsible for acquisitions from private parties (homeowners, companies, etc.). A headquarters group called "special acquisitions" deals with acquisitions from railroads, public utilities, and other government entities. Currently, Special Acquisitions consists of one employee.

Process

The construction department notifies the real estate group of the area and dates needed for construction. The construction department will also notify them if the project will require access to railroad property.

The Office of Plats and Surveys develops maps (plot plans) and provides them to the office of real estate. The office of real estate will bid appraisers, select the lowest bidder, and have them conduct a full appraisal to use in the offer to Amtrak.

Maryland stated that the vast majority of the time, Amtrak does not agree and says no to an agreement involving property interests (easements, fee exchange)–and prefers entry agreements to easements.

MDOT does not negotiate in-person with Amtrak; all communication is handled by mail, email or telephone. Special acquisitions handles the negotiations, the other parties involved are the Legal Department and director of the Office of Real Estate.

MDOT has never bought land from any railroad – they rely on easements or entry agreements.

Agreement Documents

It is not mandatory for Amtrak to sign the entry agreement. Since Amtrak prepares the entry agreement, MDOT perceives the conditions to generally be more favorable towards Amtrak.

Also, as the State is seeking something from Amtrak (or other railroad), MDOT perceives the power and leverage to lie with the railroad.

Schedule

The process is iterative and takes approximately 6 to 18 months in general - usually around 6 with Amtrak. But MDOT tries to facilitate the process by remaining in communication with Amtrak about what needs to be done. MDOT feels the process is sometimes lengthened because there can be gaps where progress is not made. The process and time required has not changed over the years for better or worse.

Appraisal

The Office of Real Estate puts out a bid for appraisers, selects the lowest bidder, and has them conduct a full appraisal to use in the offer to Amtrak or other railroad.

MDOT did not raise appraisal as a contentious area of the real estate agreement process.

Fees and Compensation

If money is involved it is placed in an escrow account – the railroad or utility can choose whether or not to accept it. Usually the State does not have to pay for reviews or legal fees as part of the project process.

Liability and Indemnification

MDOT is self- insured up to $1 million and Amtrak requests that agreements include a provision that MDOT will provide insurance and provide compensation for anything that may occur during construction. MDOT has excess insurance.

Environmental Risk

Environmental contamination is handled on a case-by-case basis. Generally, MDOT is responsible for anything they cause during construction and stated that Amtrak would be responsible for any preexisting contamination should it be discovered.

Eminent Domain

MDOT reported that there was never an issue with Amtrak resulting in the need to use eminent domain. Eminent domain has also never been an issue with other railroads, utilities or government entities.

Massachusetts

Project Types

No specific projects with Amtrak were discussed.

Agreement Process

Structure/Roles

In Massachusetts there are two offices for real estate within MassDOT, and one office for MBTA. One of the MassDOT offices normally works with acquisitions for highways (acquiring property for bridge, roadway, and traffic mitigation). This office normally works on highway projects, but has recently been tasked more with rail. The other office serves more of a development/property management role. The MBTA real estate office has a separate consultant called Transit Realty Associates.

Process

The Real Estate office would initially approach MBTA, but most of the coordination would be between the highway department and Amtrak. The real estate office would coordinate with Amtrak for scope, so Amtrak could estimate the cost to support the particular construction activity. Because MBTA owns the ROW of the Northeast Corridor, Amtrak does not have the ability to say no.

If Amtrak operations would be affected by a project, MassDOT would take that into consideration and would seek to minimize disruption to rail operations, as any disruption would also affect MBTAs commuter rail operations.

One way MassDOT finds that the process goes more smoothly is when the design engineers involve the rail group early, or if the design engineers themselves have rail experience. Having someone who understands a railroad's needs saves time, as they do not have to deal with proposals that aren't necessarily in best interest of Amtrak or other railroads. Any time there's a negotiation about railroad ROW, Amtrak or freight, it is important to have someone with railroad knowledge and experience to stop the State from asking for something that would be adverse to railroad.

Appraisal

Compensation for long-term leases is determined as a monthly payment. In the case of a lease it is usually a monthly payment. The leases are normally determined early in the construction phase, with the appraisal generally performed by someone hired by the MBTA real estate division.

MassDOT did not raise appraisal as a contentious area of the real estate agreement process.

Fees and Compensation

As an example, for flag protection, MBTA and Amtrak would reach an agreement and MBTA would then hire Amtrak. There are two levels of cost structure Amtrak can use for this. Generally, MBTA indemnifies Amtrak for a number of things and pays a lower compensation price for flagmen than what would be paid for by a third party, because Amtrak would otherwise add insurance.

Overall, this issue is not as applicable for Massachusetts because MBTA owns the Northeast Corridor ROW.

Liability and Indemnification

There are provisions in the contracts between Amtrak and MassDOT, such as the insurance policy provided by the Mass Highways contractor. The insurance policy would name MBTA and Amtrak as additional insured parties, and in most cases, CSX because it operates freight on some of the same ROW. In some places, the Providence & Worcester Railroad would also be included. The contract would also outline the notification structure.

Environmental Risk

MassDOT owns the Northeast Corridor ROW, so the issue is not applicable in Massachusetts in the same way it is in other States where Amtrak owns the ROW.

Eminent Domain

This issue was not discussed and is not as applicable for Massachusetts because MBTA owns Northeast Corridor ROW.

New Jersey

Project Types:

In general, NJDOT only obtains easements (temporary and permanent) from Amtrak.

The projects NJDOT discussed that it worked on with Amtrak were a viaduct replacement on RT21 and a RT1/9 Haynes Avenue bridge replacement. Both projects were in the same general area, and both crossed over the Northeast Corridor main line. The ROW activity occurred in the late 90's and early 2000's and actual construction occurred around 2007.

Agreement Process

Structure/Roles

At NJDOT, the director of ROW and access management has the right of approval, but the Attorney General (AG) is required to review all "contracts" between the DOT and others.

Process

The project manager negotiated the right of entry with the Amtrak engineering department. The agreement was signed off on by the project manager at NJDOT headquarters and Amtrak VP and Chief Engineer. The engineering details of the agreement were Amtrak's driving concern. The final document was a joint effort – the result of an iterative process between NJDOT /Amtrak lawyers and engineers.

Agreement Documents

NJDOT does not have a "standard" agreement document.

Schedule

One of the recommendations NJDOT provided was to get early involvement on these issues in order to keep the project on schedule (e.g., can you build a bridge in 3 hour increments if Amtrak says that you can only work on the project between 3am and 6 am?) NJDOT had had a project with CSX that did involve a fee taking. This required a 1 ½ to 2 year process of engineering discussions and design. ROW negotiations fall within this window.

NJDOT believes that separating the real estate agreement from the engineering agreement would speed up the process.

Appraisal

Appraisals are conducted using either in house or contractor appraisers, and are not a barrier to the process. For NJDOT, negotiating the engineering agreement is the primary challenge to the process. Once the engineering aspects are negotiated, the appraisal component is not a problem.

Fees and Compensation

NJDOT pays for Amtrak to review construction plans and pays for flagmen, security, etc. New Jersey views this as the cost of doing business to complete a project.

Liability and Indemnification

NJDOT reported that it is self-insured, so Amtrak requests that contractors working for the State have their own insurance.

Environmental Risk

NJDOT stated that the owner of the property is responsible for cleanup costs of preexisting contamination.

Eminent Domain

The New Jersey Attorney General told NJDOT that it cannot condemn property of any railroad (e.g., CSX along with Amtrak) without their permission because of the potential for legal issues related to the interstate commerce clause. This implies a one-way street in negotiations with rail roads.

New York

Project Types

New York provided four examples of recent agreements with Amtrak. None of these takings involved an active rail line and there were no service interruptions.

- Temporary easement initiated in April 2000
- Project in Poughkeepsie, the type of agreement was not specified.- 1996-
- Fee acquisition in NYC ($379,000) initiated in 1994
- Fee acquisition initiated in 2/2000 – still unpaid (Bronx River Greenway Project). One fee take and 2 Permanent Easement takes for transportation enhancement.

The last two were handled by the NYSDOT NYC office, the other two by other districts offices.

Agreement Process

Structure/Roles

NYSDOT has 11 regional offices each with a ROW group and its own negotiation section. The offices start and often complete the ROW acquisition process. . Transactions are elevated to headquarters if needed and cannot be handled at the regional district level. At headquarters this involves the ROW group, and the AG (has its own rail property group). AG is the official lawyer for the DOT. They also consult with the FHWA division office.

Process

New York is an "appropriation state", a power rooted in the State Constitution. NYSDOT prefers permanent easements rather than fee takings. In New York, ROW must be cleared before any project contracts can be let.

There are two categories of property takings:

- Appropriation – used by State agencies: file "map" – make offer – negotiate
- Condemnation – anybody other than State agencies (e.g., local governments): go through court process if no agreement reached

New York "appropriates" property via a map. They file a plot map showing the property and type of interest to be appropriated at the county clerk's office and then NYSDOT acquires it. There is no court procedure as in eminent domain takings, it is a ministerial action. The same procedure applies for a temporary easement, permanent easement or fee acquisition. Any contest to the appropriation goes through the New York State Court of Claims.

In the case of the two projects noted above the property was appropriated (maps were filed) and money for payment was placed on deposit; however, Amtrak did not take the payment. Amtrak

is more amicable to friendly appropriation. Sometimes, they go through purchase rather than appropriation. NYSDOT provides copy of the "map", notice of appropriation, and then the rail group provides a full set of design plans if requested (not requested in Bronx River Project) to Amtrak for each project.

Design Process

NYSDOT works with the railroads to accommodate their needs. If Amtrak would like something additional beyond the basic requirements, Amtrak would have to meet the extra costs (e.g., "period lighting").

In NY each project must consider a minimum of three alternatives. The process can be very challenging and time consuming. Indemnification always comes up as an issue, but the basic engineering/design process itself is not a problem.

Agreement Documents

NYSDOT does not use one general purpose agreement. Clauses are added or dropped as required for the specific project, and the result is a sort of "customized" standard agreement".

Schedule

The State Attorney General recommends a 12-month lead time for ROW issues if no relocation is involved, and 24 months if relocation is involved.

Appraisal

An appraisal is used to determine the full market value of a property, based on its highest and best use. Sometimes they have to do two appraisals, depending on dollar value. There is a term agreement with a list of appraisers, but they can go off-list if a specialty appraiser is needed.

If Amtrak is not satisfied with a monetary offer they can take the issue to the Court of Appeals. Money has not been an issue in acquiring property from Amtrak. Amtrak has never challenged NYSDOT in court.

Fees and Compensation

The Amtrak review of plans is considered a legitimate project expense as it is part of the cost of acquisition, and is absorbed by NYSDOT. This is usually not an issue since the dollar value is only a small part of overall project cost.

"Force accounts" are used to fund flagman and other railroad personnel involved in a project. NYSDOT prefers to use force accounts and has not gone in the direction of using its own flagman although it has been suggested. Force accounts are handled through the rail group in NYSDOT not by the ROW group.

Liability and Indemnification

New York State is self-insured. The liability is taken off the property owner for both temporary and permanent easements. NYSDOT has a claims unit that handles liability issues. The AG handles litigation. Each contractor working for the State has to have its own liability insurance.

Environmental Risk

The State Attorney General will not allow NYSDOT to assume liability for toxic substances outside of project boundaries. Amtrak has accepted this position on a case-by-case basis thus far, but does not accept it as a blanket position. If a site is risky, NYSDOT will opt for a permanent easement rather than a fee taking.

Eminent Domain

One issue that NYSDOT consulted the New York FHWA Division Office on was about Amtrak's status with respect to appropriation, as it seems that Amtrak does not seem to want to set a precedent on ceding its "Federal" authority by recognizing the State's right to appropriate property.

Pennsylvania

Project Types

In total, there are approximately 20-30 projects at various stages of negotiation and implementation between PennDOT and Amtrak.

Agreement Process

Structure/Roles

The Chief of the Utilities and Right-of-Way Section and a legal staff person negotiate the real property access agreements (for which the PennDOT terminology is a Right-of-Entry agreement).

Process

The real property access agreement can be an easement (temporary construction or aerial), or a quitclaim deed. The agreements give PennDOT whatever interests it needs to construct, operate and maintain its transportation assets. In typical highway projects, the Public Utility Commission (PUC) can use its power to show a public interest in a property, condemn, set a price on a property, and then the owner can either accept or challenge.

In the past the PUC would "notice" Amtrak, and Amtrak would not oppose the PUC order. More recently, Amtrak has taken the position that Federal law preempts the PUC if there is an impact on operations. PennDOT now does not seek to use this approach, and as a result perceives itself to have less leverage in negotiating the various agreement terms. However, PennDOT perceives that it does have some leverage because Amtrak has requested its cooperation with agreements for projects involving the upgrading the Keystone Corridor between Harrisburg and Philadelphia. Overall, this process of collaboration is effective and works reasonably well.

Agreement Documents

PennDOT has two types of agreements:

- Real Property Access Agreements (Real Estate)

- Project Reimbursable Agreement (sometimes referred to as an operations agreement). This agreement covers project specifics, payments, force accounts, insurance limits, maintenance, and repair, and various access and indemnification terms to be covered in Amtrak's contract with the State contractor that will be performing the work.

In addition and as specified in the project agreement, the contractor doing the work negotiates and executes a right of access (entry) agreement that has insurance and indemnification provisions. This agreement is between PennDOT and the contractor.

Appraisal

Determining the amount of compensation for the easement is straightforward and not contentious. The typical appraisal process is used following standard, well-established practices for how to value different cases.

Fees and Compensation

The Project Reimbursable Agreement is the construction contract and includes all specifics including payments, force accounts, insurance limits, known environmental issues, and any other relevant information.

Liability and Indemnification

PennDOT self-insures and is prohibited from agreeing to indemnification. The indemnification issue can sometimes be contentious, but for the most part the negotiations can be characterized as a typical back-and-forth process over exact terms and language until a consensus is reached.

Environmental Risk

The solution they have reached on indemnification is for PennDOT to take responsibility for clean-up of known problems and up to a relatively low dollar limit for unknown problems. Costs above the dollar limit are the responsibility of Amtrak, but PennDOT pays Amtrak a risk fee for assuming this responsibility. Some of the risk fee is refunded if no costs are incurred. PennDOT reported that the risk fee is not a reimbursable cost by FHWA. The PA Attorney General does not permit PennDOT to buy insurance, so the risk fee solution is a creative way to meet the needs of Amtrak and PennDOT given the legal constraints. The one concern PennDOT expressed is that Amtrak did not provide information on how the risk fee is set.

Eminent Domain

In the past the PUC would “notice” Amtrak, and Amtrak would not oppose the PUC order. More recently, Amtrak has taken the position that Federal law preempts the PUC if there is an impact on operations.

Appendix C. Webinar Summary Discussion Notes

Date

July 14, 2011

Participants

Victor Akpu, NJDOT
Maggie Duncan August, FHWA Delaware Division Office
Christian Christopffers FHWA Pennsylvania Division Office
Bruce Davis, NYSDOT
Annette Jacques, RIDOT
Richard Kalunian, RIDOT
Cheryl Malin, FHWA New York Division Office
Lisa Martinelli, RIDOT
PennDOT, Staff from Grade Crossing Unit and Chief Counsel
Tony Sabidussi, FHWA New Jersey Division Office
Eric Savage, FHWA Maryland Division Office

Discussion Guide

1. Have you or your agency had recent experiences in obtaining easements or acquiring property from Amtrak or other freight railroads?

2. Has your agency encountered problems in attempting to obtain an easement from Amtrak? Other freight railroads?

3. If yes, did the problems involve settling on a price of the easement, or were they related to the process of dealing with Amtrak (or other freight railroads), e.g., questions concerning who paid for the preparation of required legal documents, who paid for the Amtrak (other freight railroad) review of required legal documents, delays in returning documents, etc.? What caused delays in the process?

4. If yes, how were the issues resolved? What helped? What would make it work better? What type of agreement was used? What were its major provisions, e.g., service protection, maintenance responsibilities, time period, liability-indemnification, etc.)?

5. Has your agency encountered any problems in attempting to acquire ROW from Amtrak? Other freight railroads?

6. If yes, did the problems involve settling on a price of the property, or were they related to the process of dealing with Amtrak (or other freight railroads), e.g., questions concerning who paid for the preparation of required legal documents, who paid for the Amtrak (other freight railroad) review of required legal documents, delays in returning documents, etc.

7. If yes, how were the issues resolved? What type of agreement was used? What were its major provisions?

8. Has your agency ever attempted to acquire ROW from Amtrak using eminent domain?

9. If yes, did this involve going through a State public utility commission and/or the Surface Transportation Board?

Webinar Notes

Major Points

- The price of the easement/acquisition has not been a contentious issue and several participants specifically mentioned having had appraisals done as part of the process.

- Major concerns and points of contention revolve around indemnification in general, the assignment of environmental and other risks, and related financial payments.

- Participants noted a recent change in Amtrak attitude/culture in reaching or not reaching agreements. Standard agreements which were acceptable in the past are no longer acceptable to Amtrak.

- There seems to be uncertainty as to what rights Amtrak has under its Federal charter.

- All States seem to have had multiple cases covering a variety of situations and issues.

Q1: Have you or your agency had recent experiences in obtaining easements or acquiring property from Amtrak or other freight railroads?

RIDOT

Indemnity was a major issue in gaining access for commuter rail to Amtrak-owned lines south of Providence. This was not directly an FHWA ROW issue, but the principles established seem to have carried over to FHWA ROW cases. The issue was recently settled after about 10 years. It required new legislation to create a "quasi-public agency" to indemnify Amtrak.

Amtrak wants RIDOT to provide a $200 million insurance policy to cover risks.

A letter of credit is being used for all permanent easements going forward. It applies the commuter rail indemnification agreement to all easement agreements with Amtrak going forward – mostly bridges- and RIDOT needs to institute a new agreement with Amtrak for each new project to rehab a bridge.

P&W railroad has not asked for same level of indemnification as Amtrak.

Amtrak is taking the initiative to improve the process and has formed a special committee/team and RIDOT meets with Amtrak using monthly teleconferences and quarterly meetings. Tom Moritz of Amtrak in Philadelphia is the contact person.

New York and New Jersey have not heard of this Amtrak initiative.

PennDOT

They have started meeting with Amtrak in last 3-4 months – mostly engineering staff but not attorneys or ROW staff.

There is a higher level executive group that meets to work through indemnification issues.

Amtrak would like PennDOT to waive sovereign immunity.

PennDOT has had three recent projects involving at-grade crossings.

Q2: Has your agency encountered problems in attempting to obtain an easement from Amtrak? Other freight railroads?

PennDOT

Has experience with design/construction agreements for crossings, closings, and bridge replacements.

Project agreements include real property aspects - both temporary vs. permanent – and indemnification issues very important here.

Negotiating the Project Agreement is the key.

PennDOT does not want to follow the RIDOT model on indemnification.

Public Utility Commission appropriation is used to pay for acquisitions.

Amtrak is cooperative on projects where they have a vested interest, i.e., projects to improve the railroad and not the highway.

Traditional language on indemnification, which used to work, is no longer acceptable to Amtrak.

NYSDOT

Has experience with temporary easement, permanent easement, and fee acquisition.

Amtrak has refused to accept payment from NYSDOT for easements/acquisitions, and "holds force account hostage" as leverage in negotiations over access agreements. This is a more recent occurrence.

Amtrak does not recognize NYSDOT ability to appropriate for its highway projects.

NYSDOT has not had similar problems in dealing with CSX on ROW access issues.

"Environmental risk fee" was mentioned but not defined. This may involve acquiring insurance against claims.

Money/price is not an issue on acquisitions and access agreements.

Q3: If yes to Question2, did the problems involve settling on a price of the easement, or were they related to the process of dealing with Amtrak (or other freight railroads), e.g., questions concerning who paid for the preparation of required legal documents, who paid for the Amtrak (other freight railroad) review of required legal documents, delays in returning documents, etc.? What caused delays in the process?

Q4: If yes to Question 2, how were the issues resolved? What helped? What would make it work better? What type of agreement was used? What were its major provisions, e.g., service protection, maintenance responsibilities, time period, liability-indemnification, etc.)?

NJDOT

The major issue on environmental cleanup costs is who pays. Amtrak wants the State DOT to assume the risk and pay for any environmental cleanup and indemnify Amtrak of all risk as part of any access agreement.

RIDOT

Amtrak wants RIDOT to assume responsibility for all environmental concerns related to a project. Amtrak wants to be taken out of potentially responsible party (PRP) status.

PRP - Potentially Responsible Party terminology is from CERCLA (Superfund Act).

Amtrak wants the States to be responsible for environmental cleanup.

Amtrak wants 100% risk transfer on acquisitions/easements and even beyond the boundaries of the project.

FHWA will not pay for environmental risk fees. PennDOT noted that they must pay the whole cost. NYSDOT and NJDOT have the same experience regarding payment of environmental risk fees.

The States would like FHWA to pay for the risk fee.

No one knows how Amtrak determines the risk fee.

Q5: Has your agency encountered any problems in attempting to acquire ROW from Amtrak? Other freight railroads?

NJDOT

Had acquired land from Conrail in 2008 – a piece of land with no rail tracks involved. A good appraisal resulted in Conrail accepting NJDOT offer. However, Conrail took difference in the State offer and their asking price as a donation to the State and indicated they would take this as a tax deduction.

NYSDOT

Has acquired land from CSX and Amtrak, but most was not on rail lines. CSX transactions were not a problem and, specifically, there were no problems with appraisal/valuation. CSX accepts the State's rights, including appropriation, but Amtrak does not.

PennDOT

PennDOT does easements rather than acquisitions because of title problems in acquisitions. Transactions with Amtrak are almost all easements. They never went to court with Amtrak, but had to with CSX and Conrail.

Q6: If yes to Question 5, did the problems involve settling on a price of the property, or were they related to the process of dealing with Amtrak (or other freight railroads), e.g., questions concerning who paid for the preparation of required legal documents, who paid for the Amtrak (other freight railroad) review of required legal documents, delays in returning documents, etc.

Q7: If yes to Question 5, how were the issues resolved? What type of agreement was used? What were its major provisions?

Q8: Has your agency ever attempted to acquire ROW from Amtrak using eminent domain?

Q9: If yes to Question 8, did this involve going through a State public utility commission and/or the Surface Transportation Board?

NYSDOT.

Private railroads recognize States' authority to take land in the public interest.

Using the force account mechanism is a useful tool for project implementation.

RIDOT

Even if easement is in place, if a force account agreement is not executed, Amtrak will not allow RIDOT onto property. Coordination is a problem.

PennDOT

Other railroads have never brought a matter to the STB even though they could have and PennDOT has never gone before the STB.

Amtrak claims to have acquired special rights when created giving Amtrak "Federal preemption." This is the difference between Amtrak and the freight railroads.

NYSDOT

NS suggested the possibility of going to the STB at first, but backed down when the State made its case during negotiations.

Appendix D. Amtrak Status Under Eminent Domain

There seems to be some confusion regarding railroads' immunity under eminent domain. Our understating is that any attempt to acquire an ACTIVE rail line would require a decision from the STB (Surface Transportation Board)[14] that the line was not required for the public convenience and necessity, and that such a decision would follow from a quasi-judicial proceeding before the STB. This is probably a time consuming and expensive process. However, it seems that the Connecticut and New Jersey AG's may have assumed that this scenario would apply to the attempted taking of any railroad property, which may not be the case. This issue was also raised in an AASHTO Clearinghouse Report by the State of Illinois. Response from the States were varied on the need for STB approval and generally noted that condemnation of railroad property was a rarity and that the State agencies and railroads preferred easements.[15] Developing a final answer to this question was beyond the scope of this current project and is an area for further research.

It would appear that Amtrak is NOT a Federal Agency, in the sense that FHWA is a Federal agency. The legislation (as Amended over the years) states that Amtrak is a railroad carrier that is to be operated as a for-profit corporation and is not a department, agency or instrumentality of the United States government.[16] Amtrak's status was affirmed by an attorney for the Congressional Research Service who was asked to explore this issue in regard to proposed legislation dealing with the privatization of the Northeast Corridor.[17]

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[14] The Surface Transportation Board (STB) was created in the ICC Termination Act of 1995 and is the successor agency to the Interstate Commerce Commission. The STB is an economic regulatory agency that Congress charged with resolving railroad rate and service disputes and reviewing proposed railroad mergers. The STB is decisionally independent, although it is administratively affiliated with the Department of Transportation.

The STB serves as both an adjudicatory and a regulatory body. The agency has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments); certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission.

[15] *AASHTO 2006 Clearinghouse Report*, Publication No. FHWA-HEP-06-025, May 15, 2006. CONDEMNATION OF RAILROAD PROPERTY - 2006 CLEARINGHOUSE REPORT - Realty - FHWA

[16] A Summary of Current Legislative Provisions Prescribing the Legal and Regulatory Framework Governing The National Railroad Passenger Corporation (Amtrak), A Council Policy Paper
Amtrak Reform Council, December 4, 2000, p.7. http://govinfo.library.unt.edu/arc/materials/legsum.pdf

[17] Congressional Research Service Memorandum
To: House Committee on Transportation and Infrastructure
From: Robert Meltz, Legislative Attorney
Subject: Takings issues raised by discussion draft of Amtrak bill
July 12, 2011
- Quick View

However this does not mean that Amtrak does not enjoy a "unique" status as a creation of Congress and therefore does have certain preemptive Federal rights and privileges. Amtrak's unique position among railroads and its immunity to State eminent domain actions, at least under certain circumstances, was affirmed in the case cited by ConnDOT. (Union Ctr. Redevelopment Corp. v. AMTRAK, 103 F.3d 62 (8th Cir, 1997) UNION CENTER REDEVELOPMENT CORPORATION v. NATIONAL RAILROAD PASSENGER CORPORATION, No. 95-3412. - US 8th Circuit | FindLaw). The specific circumstances under which Amtrak is or is not immune from State eminent domain action needs to be explored further.

Appendix E. Glossary

Access. A way of approaching or entering a property. Access includes ingress, the right to enter, and egress, the right to leave. In zoning and subdivision regulations, recorded lots are required to have direct access to a public street or highway or to a private street meeting public standards. This guarantees entry by owners and emergency vehicles.

Appropriation. Appropriation is the taking of private property for public use under the power of eminent domain. It is the power of the State to appropriate property for public use, upon payment of just compensation. It may be exercised directly by the State itself, or the State may, in the exercise of the power, select particular agencies, either natural persons or corporations, on whom it confers the right to take private property for public use.

There may be an appropriation of the rights of ownership in a particular piece of land, the entire interest of the former owner thus passing to the appropriator, or a right merely to use the land for the particular public purpose may be acquired.

Condemnation. The term "condemnation" is used to describe the formal act of the exercise of the power of eminent domain to transfer title to the property from its private owner to the government. Condemnation via eminent domain indicates the government is taking ownership of the property or some lesser interest in it, such as an easement. After the condemnation action is filed the amount of just compensation is determined. However, in some cases, the property owner challenges the action because the proposed taking is not for "public use", or the condemner is not legislatively authorized to take the subject property, or has not followed the proper substantive or procedural steps as required by law.

Easement. The right to use property owned by another for specific purposes or to gain access to another property. For example, utility companies often have easements on the private property of individuals to be able to install and maintain utility facilities.

Typically an easement provides the right to perform a specific action on a particular tract of land, or portions of a particular tract of land, without owning the underlying fee. Easements may be permanent or temporary. A temporary easement either has a specific or an indefinite termination date. Temporary Construction easements usually have specific termination date. Some have indefinite termination dates such as egress and ingress for harvesting timber which terminates when the timber is harvested.

Eminent Domain. Eminent domain is an action of the State to seize a citizen's private property, or seize a citizen's rights in property with due monetary compensation, but without the owner's consent. The property is taken either for government use or by delegation to third parties who will devote it to public or civic use or, in some cases, economic development. The most common

uses of property taken by eminent domain are for public utilities, highways, and railroads. Some jurisdictions require that the government body offer to purchase the property before resorting to the use of eminent domain.

Some U.S. States, including New York and Louisiana use the term ‘appropriation’ as a synonym for the exercising of eminent domain powers.

Fee Interest. Entitles a landowner to exercise complete control over use of land, subject only to government land use regulations. In contrast, less-than-fee interest refers to the purchase of limited interest in land rather than outright ownership such as the purchase of development rights via conservation, open space, or scenic easements.(Fee simple is a type of fee interest)

Force account. Railroad force account work is work performed by railroad forces or the railroad’s contractor. Generally, railroad force account work is funded and work is performed in conjunction with an approved highway construction project. This work may involve: planking (road crossing surfaces); track adjustments; installation of warning devices; relocation of existing warning devices; installation or extension of drainage structures under tracks; wire line adjustments; flagging for train operations; other related work. The SDOT normally reimburses the railroad for force account work, except where an existing highway is crossed by a new railroad. Reimbursable force account work is limited to the work detailed in the State-railroad agreement and attached exhibits.

Indemnification. The part of an agreement that provides for one party to bear the monetary costs, either directly or by reimbursement, for losses incurred by a second party. To indemnify another party is to compensate that party for loss or damage that has already occurred, or to guarantee through a contractual agreement to repay another party for loss or damage that occurs in the future.

Liability insurance is a part of the general insurance system of risk financing to protect the purchaser (the "insured") from the risks of liabilities imposed by lawsuits and similar claims. It protects the insured in the event he or she is sued for claims that come within the coverage of the insurance policy. Liability insurance is designed to offer specific protection against third party insurance claims, i.e., payment is not typically made to the insured, but rather to someone suffering loss who is not a party to the insurance contract. When a claim is made, the insurance carrier has the duty (and right) to defend the insured. The legal costs of a defense normally do not affect policy limits unless the policy expressly States otherwise; this default rule is useful because defense costs tend to soar when cases go to trial.

Liability insurers have two (or three, in some jurisdictions) major duties: 1) the duty to defend, 2) the duty to indemnify and (in some jurisdictions), 3) the duty to settle a reasonably clear claim.

Regulatory Taking. A regulatory taking occurs when a regulation becomes so onerous that it has the practical effect of a physical appropriation of land. An extreme example would be zoning private land as a public park. Such a regulation does two things: 1) it prevents the owner from putting the land to any economic use, and 2) it prevents the owner from exercising one of the most fundamental characteristics of property ownership: the right to exclude others. Thus, the regulation would have a similar effect as if the public agency had condemned the land and built a park. *See* Taking.

Right-of-Entry Agreement. An agreement whereby the railroad grants to the SDOT, its contractors, subcontractors, officers, agents and employees, and others acting under its or their authority the right to enter upon and have ingress to and egress from the specified property described in the agreement for the purpose of performing work specified in the agreement.

Taking. A taking occurs when a public agency takes, occupies, or encroaches upon private land for its own proposed use, such as to build roads, create parks, or develop other public uses. These actions—called eminent domain or condemnation actions—are premised upon the payment of just compensation or fair market value for the property.

Sovereign Immunity. Sovereign immunity is a judicial doctrine that prevents the government or its political subdivisions, departments, and agencies from being sued without its consent. The doctrine stems from the ancient English principle that the monarch can do no wrong.