Negotiating Passenger Rail Operating Rights: Lessons Learned in Massachusetts

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INTRODUCTION

With recent increases in federal funding for rail infrastructure projects, commuter rail agencies across the country are struggling to secure operating rights on right of way owned by or shared with freight railroads or Amtrak. Issues relating to operating windows, control of maintenance and dispatching, liability allocation, and construction coordination each pose potentially serious impediments to commuter rail and intercity passenger service expansion.

Passenger rail expansion projects in New York, California, Florida, Ohio, and Missouri, among others, have faced significant challenges in negotiating with Amtrak or freight railroads for the operating rights and infrastructure improvements necessary to accommodate commuter service.[1] State governments are pressing Amtrak and the freight railroads to accommodate commuter rail expansion, but often fail to approach deals with an understanding of the business imperatives of those host railroads. The complexity of these issues, combined with the strict deadlines attached to new federal funding, threaten to stall the commencement of critical transportation infrastructure projects.

In Massachusetts, several recent deals with freights and other state agencies have successfully navigated these critical issues. This paper explores novel solutions employed in Massachusetts in right of way acquisitions and trackage rights agreements. It will present concrete negotiating strategies and share successful outcomes on key issues by looking at recent Massachusetts deals, including (1) the acquisition of right of way by the Commonwealth of Massachusetts from CSX Transportation, Inc. ("CSX") to Fall River/New Bedford and the pending acquisition of right of way from Framingham west to Worcester; (2) the expansion of Massachusetts Bay Transportation Authority ("MBTA") commuter rail service to points south of Providence, RI; and (3) the acquisition of trackage rights over property owned by Pan Am Railways and its affiliates in Massachusetts and New Hampshire.

For trackage rights deals to succeed, commuter rail agencies must work to understand the motives and needs of freight railroads and Amtrak. When states seek to introduce or expand operations on jointly-used right of way, they are likely to face some form of the following question from the host railroad: "What is the benefit to our business of accepting the added risk and complexity involved in your use of our railroad?" Commuter rail agencies have the burden of answering that question with creative solutions and business inducements.

By expanding their perspective to include the economic considerations that drive the freight railroads, commuter rail agencies can strike passenger trackage rights deals that benefit both commuter rail and freight service, with broader economic benefits for the citizens that the public agencies serve. Creativity is a key to the negotiation of passenger rights deals; there is no "market" standard for the difficult issues that transportation agencies, freight railroads and Amtrak face in sharing right of way. Identifying a viable business deal is a critical step, but it must be followed by steady, incremental, positive negotiations that preserve the focus of both sides on the deal.

KEY ISSUES

Any negotiation involving the sharing of a finite asset between parties that have different core missions is challenging. States and their commuter rail agencies have a powerful public mission to move citizens efficiently and reliably, which enhances quality of life and boosts state and regional economies. Recent increases in federal

[1] *See, e.g.*, Angela Cotey, States Are Delving Deeper into High-Speed Rail Planning, But Are the Host Railroads Onboard?, Progressive Railroading, June 2010.

funding for high speed rail, commuter rail expansions, and new starts have promoted passenger rail transportation as a national imperative. Notwithstanding the possibility of financing projects with federal funds, state agencies must answer to their taxpaying constituents, and are not accustomed to viewing the interests of the freight railroads as valuable to the citizens that the public agencies serve.

Many currently proposed projects involve the sharing of right of right of way with freight railroads or Amtrak intercity service. Freight railroads have played an unparalleled role in the development of the nation's economy, and the federal government's long-standing protection of their mission has contributed to the freights' often fierce defense of their interests. Freight railroads must answer to their stockholders or other investors, and require that trackage rights deals make financial sense and do not put their businesses at risk. Amtrak, meanwhile, enjoys its own unique status in providing intercity and interstate service, and guards its own mission zealously.

The three rail sectors – commuter rail, freight, and intercity – are not accustomed to recognizing benefits from new or increased sharing of right of way. The prospect of hosting passenger service on freight rail corridors is generally viewed as an imposition of new risks, increased maintenance, reduced operating flexibility, and a general threat to autonomy.

Some of main categories of issues are described in further detail below.

Operating Rights and Windows

One key concern of operating railroads faced with the introduction of new or increased commuter service is the loss of their previously unconstrained ability to schedule freight or intercity service. Arriving at a solution is difficult enough when the new commuter rail service schedules are fixed as to time and frequency of service, but commuter rail agencies generally seek the ability to increase service as passenger demand increases over time.

Control of Maintenance and Dispatching

Freight railroads and Amtrak often care deeply about maintaining control of right of way maintenance and dispatching. Commuter rail agencies also understand that even with contractual protections for their service windows, performing maintenance and dispatching is the surest way to guarantee that operating priorities are honored.

Liability Allocation

The introduction of new or increased passenger service on lines already used by freight railroads or Amtrak adds new liability risks for all parties. The potential for collisions between trains operated by the different parties, as well as accidents or other incidents that might arise from the maintenance or dispatching work of the controlling railroad, is undeniable. In the absence of other business inducements, host railroads often approach the liability issue from a "but-for" perspective: they expect the commuter rail agency to accept responsibility for any liability that would not have arisen but for the operations of the passenger service. Host railroads ask that state agencies indemnify them for all incidents in which the agencies are involved, including accidents arising from the negligence of the host railroad. The patchwork of liability arrangements in place nationally has frustrated any attempt by host railroads or commuter rail agencies to identify an "industry standard" for liability allocation. The lack of any generally agreed-upon risk management formula makes negotiating these provisions exceptionally difficult.

State statutory liability caps can limit risk somewhat, but when those caps do not match the maximum liability to which the other parties, such as Amtrak, are exposed, the liability discussion can be exceedingly difficult. The challenge in liability discussions is to seek solutions that circumscribe risk through insurance or liability-sharing arrangements.

Construction Coordination

When commuter rail expansion projects involve significant construction on jointly-used right of way, freight railroads and Amtrak are understandably attuned to any interruptions to their service. State agencies often must urge the host railroads to accept short-term interruptions in exchange for improved right of way in the longer term. Measuring accurately the costs of service interruptions to freight railroads is difficult, especially when long-term construction might cause freight customers to find permanent alternative solutions to their shipping needs.

THE BUSINESS PROPOSITION

In light of all of the challenges that new or increased passenger service brings to host railroads, commuter rail agencies must work with those railroads to identify business inducements to balance the undeniable burdens that come along with the trackage rights that the agencies seek. Attempting to solve or minimize the trackage rights issues described above is critical to negotiating a successful deal, but it is secondary to providing the freight railroads or Amtrak with a reason to engage on those topics.

There is no road map or formula for the types of inducements that can become the basis of a trackage rights deal. In Massachusetts, the transportation agencies, working closely with the freight railroads, Amtrak, and Rhode Island transportation agencies, have over the past several years identified a number of business imperatives of host railroads that have allowed the parties to navigate the thorny issues and finalize deals that benefit all parties.

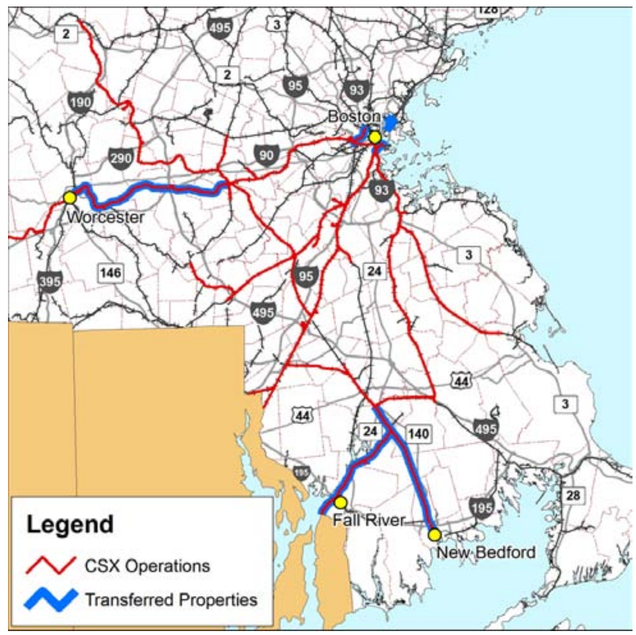
MASSACHUSETTS CASE STUDIES

Acquisition of Right of Way and Trackage Rights Agreement Among MassDOT, the MBTA, and CSX Transportation

Until the recent deal described in this section, CSX owned the railroad lines between Framingham and Worcester, west of Boston; from Cotley, south of Boston, to the cities of Fall River and New Bedford; the Boston Terminal Running Track in South Boston ("BTRT"); and the Grand Junction Branch, from Boston to Chelsea. CSX operates a multi-model transfer facility at Beacon Yards in Boston, but has been seeking to relocate the facility from Boston to points west of the city.

The MBTA operates commuter rail trains from Boston to Worcester on the Worcester Main Line, including over the 22-mile CSX-owned Framingham to Worcester segment, pursuant to two agreements, including a 1994 trackage rights agreement between the MBTA and Conrail, CSX's predecessor in interest (the "1994 Agreement"). Under these agreements, the MBTA was allowed to run a maximum of six one-way trains on the track between Framingham and Worcester, with CSX providing the maintenance and dispatching services. CSX also provides maintenance and dispatching of MBTA-owned property between Boston and Framingham pursuant to a separate agreement (the "1985 Agreement"). The MBTA pays CSX a car-mile charge for maintenance, as well as a dispatching charge. The 1994 Agreement provides that the MBTA will indemnify CSX for most liability arising from the MBTA's operations, with the exception of injuries to CSX employees or property when such injury arises from the gross negligence or willful misconduct of CSX.

CSX also owned the southern portions of the so-called South Coast Lines, which run from Boston to Fall River and New Bedford; the CSX-owned portion included the 17-mile New Bedford Secondary and the 14-mile Fall River Secondary. Finally, CSX owned the BTRT and the Grand Junction. The properties involved in the CSX-MassDOT deal are shown on the map below.



(Source: MassDOT Planning)

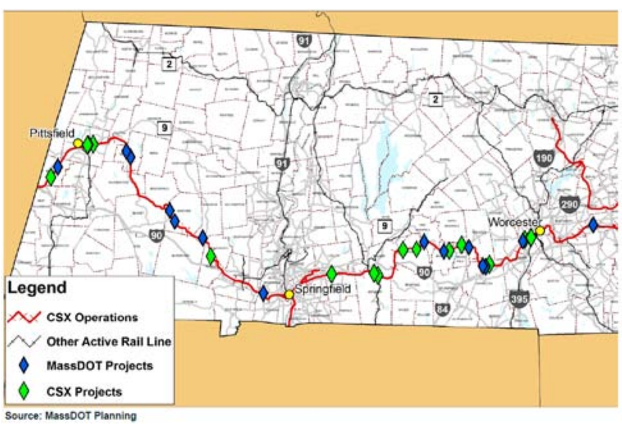
The MBTA has long sought to increase service between Boston and Worcester, which is Massachusetts' second-largest city, and to control maintenance and dispatching on the line. The Massachusetts Department of Transportation ("MassDOT") has viewed the expansion of commuter rail service to Fall River and New Bedford as a critical priority that would revitalize the economies of those cities. Massachusetts has also coveted the Grand Junction and BTRT, two strategically valuable rail assets located in Boston's urban core. The Grand Junction is critical to the MBTA's ability to maintain its service equipment, as it links maintenance facilities located on the north and south sides of the urban area. BTRT is important in preserving freight access to the South Boston port.

Each of these assets has tremendous potential for future MBTA transportation uses, and the CSX transaction presented an opportunity to acquire them.

The Business Proposition

Starting in earnest in 2006, the MBTA began to negotiate with CSX to acquire the Framingham to Worcester right of way, the South Coast Lines, the BTRT and Grand Junction. Rather than beginning the negotiations with the thorny issues stemming from future sharing of the right of way, the parties sought to identify their fundamental priorities. For both parties, arriving at the right purchase price was important, but a central aspect of the business deal became a joint reconstruction project for state-owned bridges that would allow double-stacked freight cars. In the final deal, MassDOT agreed to raise or otherwise reconstruct approximately 17 state-owned bridges, while CSX agreed to lower the track in 14 locations to allow double-stacking.

CSX/MassDOT Bridge Project



(Source: MassDOT Planning)

The double-stacking project was beneficial not only from CSX's business perspective. It also advanced the state's interest in promoting a robust freight rail industry in Massachusetts, which has benefits for other sectors of the economy.

CSX and MassDOT executed a Definitive Agreement on October 10, 2008 for the transfer of the Worcester Main Line, South Coast Lines, BTRT, and Grand Junction, for a total purchase price of $100 million. MassDOT would buy the right of way, with CSX reserving a freight easement. That agreement memorialized the bridge reconstruction deal, and also granted the MBTA the right to run an additional five one-way trips between Boston and Worcester. The Definitive Agreement did not address many of the issues relating to the shared use of the right of way, but with the business deal in place, the perspective of the parties had changed, and the momentum increased the likelihood of a final agreement. Most importantly, the business deal had provided CSX with a reason to accommodate new and increased MBTA service on its property.

Resolution of Trackage Right Issues – Worcester Line

The Definitive Agreement set up a two-part closing. The transfer of the South Coast properties, the BTRT and the Grand Junction closed in June 2010, while the transfer of the Worcester Main Line will occur after completion of the bridge reconstruction project and CSX's move from Beacon Yards to Worcester and Westborough. Key aspects of the trackage rights agreement are as follows:

- <u>Operating Rights and Windows</u>: The parties took a practical, cooperative approach to the scheduling of trains, deferring to each other's service priorities. When the trackage rights agreement becomes effective upon the transfer of the Worcester Main Line, the MBTA will have priority scheduling during the morning and evening rush hour windows, with CSX allowed to run one one-way freight train during each such period. During the midday and late night periods, the parties will share usage more evenly, with the MBTA able to run an additional 12 passenger trains and CSX an additional four freight trains. The midnight window, from 12:01 a.m. to 4:59 a.m., is an exclusive freight window.
- <u>Control of Maintenance and Dispatching</u>: Except for some yard lead tracks in Worcester, which will be freight-only, the Worcester Main Line properties to be acquired from CSX are joint usage properties and will be maintained and dispatched by the MBTA pursuant to agreed-upon standards and procedures. CSX will pay the MBTA a per-car mile charge of $0.433, a monthly signal and switching charge of $53,333, and a dispatching charge currently set at approximately $100,000 per year.
- <u>Liability Allocation</u>: Of all the issues faced in the CSX deal, liability allocation was perhaps the most challenging. CSX was reluctant to give up the favorable indemnification provisions of the 1994 Agreement, and sought protection from

liability for all incidents arising in any way from the commuter rail service.

Ultimately, the parties agreed to a heavily-negotiated and intricate liability arrangement, which is more advantageous to the MBTA than the previous deal, but also provides benefits to CSX. In the new agreement, in the event of accidents involving trains and other equipment of both the MBTA and CSX each party will take responsibility for damage to its own equipment and employees. As for claims by third parties, the MBTA takes responsibility for such claims except for damages from claims arising from CSX's willful misconduct, and for punitive damages caused by its actions, up to the MBTA's $7.5 million self-insured retention limit. For the MBTA, the liability allocation was made palatable by an agreed-upon annual contribution by CSX of $500,000 (increased annually based on a cost index) toward the cost of the MBTA's insurance. CSX preserved the bulk of its indemnities from the MBTA, and its insurance contribution is stable.

Resolution of Trackage Right Issues – South Coast

In connection with its new focus on shipping west of Boston, CSX agreed in 2009 to assign to a short line railroad, Massachusetts Coastal Railroad LLC ("Mass Coastal"), the freight easement that CSX would retain after the transfer of the South Coast Lines to MassDOT. The deal introduced a third party railroad to the overall CSX-MassDOT-MBTA deal. The trackage rights agreement between the MBTA and the freight railroad had to address the current freight-only status of the property, as well as the future reconstruction of the line for commuter rail purposes and the subsequent joint usage of the right of way. Again, MassDOT and the MBTA sought solutions unique to the circumstances. The agencies aimed to make possible the expansion of commuter rail service to Fall River and New Bedford while at the same time enhancing freight rail service, which would further leverage the economic benefits to the Commonwealth of the South Coast Rail Project.

Under the trackage rights agreement between the MBTA and Mass Coastal, the South Coast properties are initially classified as freight-only, with Mass Coastal maintaining and dispatching the properties according to certain baseline standards. Upon the reconstruction of the right of way by MassDOT for commuter rail expansion, the South Coast Rail properties will be re-classified as joint usage, and the operating rights and responsibilities will change.

- <u>Operating Rights and Windows</u>: When the properties become joint usage, the MBTA will have the exclusive right to schedule passenger trains, and those trains will have priority over freight trains.
- <u>Maintenance and Dispatching</u>: At the commencement of commuter rail service, the MBTA will assume maintenance and dispatching responsibilities for the property. Mass Coastal will pay the MBTA a car mile charge of $0.433 for maintenance.
- <u>Liability Allocation</u>: Mass Coastal and the MBTA agreed to a liability allocation arrangement similar to that set forth in the 1985 Agreement. In the event of a joint accident, the parties each take responsibility for claims arising from damage to their own employees and property. With respect to third party claims, each party is responsible for the cost of claims arising from its own negligence. Because of Mass Coastal's concerns about the costs of insurance to cover its liabilities, the MBTA agreed that prior to the commencement of commuter rail service, the MBTA will work with Mass Coastal to identify opportunities to lessen the costs of risk management.
- <u>Construction Coordination</u>: One of Mass Coastal's primary concerns was the effect on its business of the extensive construction required to rebuild the right of way to accommodate commuter rail service. Mass Coastal sought to minimize service outages during the construction phase, both to minimize the loss of profits during that time and to prevent the migration of customers to other shipping solutions while Mass Coastal was unable to service those customers. The MBTA, though it recognized the potential short-term disruption to Mass Coastal's business, believed that the long-term benefits of the South Coast Rail would have a net-positive effect on the freight business.

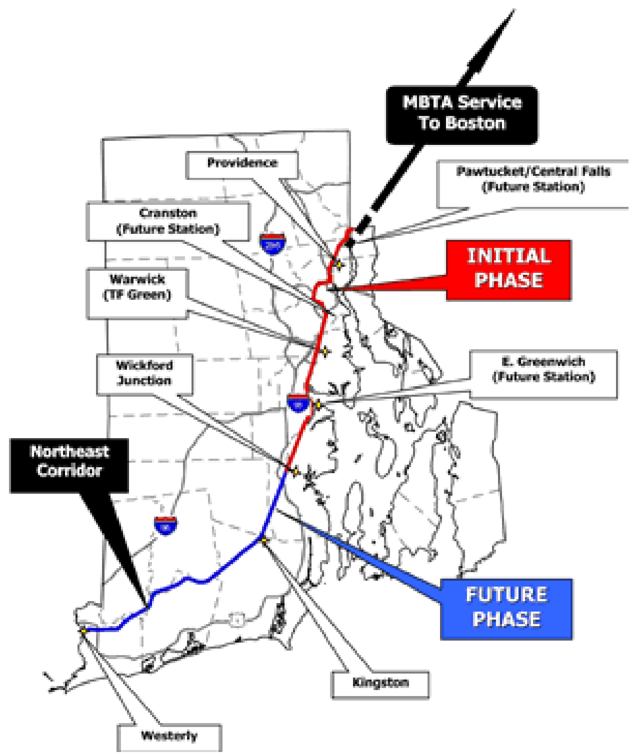
  The parties agreed to a multi-part solution. First, the MBTA will draft and provide Mass Coastal with the opportunity to comment on a Reconstruction Coordination Plan detailing the construction work, planned freight service suspensions, and related procedures and anticipated effects. Second, although the MBTA has the right to impose freight service suspensions, for Extended Service Suspensions (generally, five or more days in length) the parties will agree to a Mitigation Plan. That plan, among other things, will detail shipping alternatives that can be implemented during the service suspensions, as well as reimbursement owed by the MBTA to Mass Coastal for identifiable lost profits. In certain cases, the MBTA may compensate Mass Coastal in surplus railroad materials salvaged from the South Coast Rail project, in lieu of cash.

The precise impact of the South Coast Rail Project on Mass Coastal will depend on the final construction plan for the South Coast Rail project. But the trackage rights agreement with Mass Coastal establishes a framework for cooperation between the commuter rail agencies and the freight railroad during the implementation of this major project. The state agencies treated freight business as an important consideration in the South Coast project, and the agreement respects the priorities of the freight carrier.

Expansion of MBTA Service South of Providence, Rhode Island

Since 1988, the MBTA has provided commuter rail service from Attleboro, MA to Providence, RI. Under a series of agreements between the Commonwealth and the state of Rhode Island, called the "Pilgrim Partnership Agreements", as well as a trackage rights agreement between the MBTA and Amtrak, the MBTA has provided seamless service between Boston and Providence. The framework of the long-standing agreement is unique: The MBTA provides service in Rhode Island through the MBTA's commuter rail operator, while Rhode Island contributes federal capital funding toward projects that benefit commuter rail service in both states. Capital projects funded by Rhode Island include the construction of the commuter rail layover facility in Pawtucket, RI, and the purchase of five Kawasaki coaches, which support the Rhode Island service and the MBTA commuter rail service generally. The deal works because Rhode Island has federal capital funds to contribute to this important regional service between the two state capitals.

In addition to providing for eleven and a half (11 ½) round trips between Boston and Providence, the Pilgrim Partnership Agreements have long contemplated the extension of commuter rail service south of Providence, to TF Green Airport in Warwick, RI ("Warwick") and to Wickford Junction in the town of North Kingstown, RI ("Wickford"). The agreement provided for the implementation of commuter rail service to Warwick, subject to certain conditions and further negotiations, and provided for further examination of the costs of service expansion to Wickford Junction. The MBTA's commitment to cooperate with the Rhode Island Department of Transportation ("RIDOT") to bring commuter rail service to TF Green Airport was related to the environmental mitigation for the Central Artery/Tunnel Project (the "Big Dig"). This service, a total of approximately 20 miles, is known as the "South County Service."



(Source: www.dot.state.ri.gov)

RIDOT secured funding from the Federal Transit Administration to construct an intermodal station at T.F. Green Airport in Warwick and a commuter rail station in Wickford. Because the South County Service was to be provided on Amtrak-owned right of way, RIDOT had entered into an Access Agreement with Amtrak, which provides RIDOT with rights to provide the South County Service. Amtrak would maintain the right of way and provide dispatching services.

The last major ingredient for the commencement of service was the negotiation of the details of the operating agreement between the MBTA and RIDOT. The MBTA, while committed to operating the South County Service, sought to provide it only if it could do so without incurring additional net costs for the MBTA or the Commonwealth. Although revenue projections for the service indicated that revenue would exceed the incremental costs of the service, the MBTA and RIDOT worked to structure a deal in which Rhode Island would cover any costs overruns. In the deal that the parties ultimately struck in 2010, RIDOT will reimburse the MBTA in cash in the amount of any revenue shortfalls, or provide capital funding for projects that benefit the commuter rail service and are approved by the MBTA.

Liability

RIDOT agreed in principal with the MBTA's position on the costs of service, but liability issues proved the most complicated to resolve. Amtrak would only agree to grant Rhode Island the necessary trackage rights if Rhode Island agreed to indemnify Amtrak for all claims arising in any way from the commuter rail service. The Rhode Island legislature passed a law allowing RIDOT to indemnify Amtrak on those terms, but that same law did not allow RIDOT to indemnify the commuter rail operator to the same degree.

Given the state law constraints on indemnifying the MBTA and its commuter rail operator, and the MBTA's position that its provision of the South County Service needed to be cost-neutral to the MBTA, the parties sought a mechanism through which RIDOT could defray the MBTA's costs of risk management and of liabilities incurred in the operation of the service. Eventually, the MBTA and RIDOT arrived at a two-part solution.

First, the MBTA added the South County Service to its existing general liability policy. RIDOT pays the incremental cost of that insurance as an operating expense of the service. Second, if the MBTA incurs costs from other operating liabilities, Rhode Island will fund, through a capital pool, additional capital projects that benefit the commuter rail service. The liability solution makes use of the assets that the MBTA and RIDOT each brought to the negotiating table: the MBTA can purchase insurance cost-effectively given its presence in the insurance market, while RIDOT can call into service its federal funding in the event that the service generates additional operating costs.

Commuter rail service to TF Green Airport commenced in December 2010, offering six (6) daily trips between Warwick and Providence. Service to Wickford is expected to commence in late 2011.

Trackage Rights Agreement Between the MBTA and Pan Am Railways

In another recent deal with important benefits for the Commonwealth of Massachusetts' rail planning efforts, the MBTA has acquired from Pan Am Railways and its affiliates trackage rights allowing the expansion of service on virtually all of the right of way owned by Pan Am in Massachusetts, as well as some property in New Hampshire. The recent agreement is the latest development in a cooperative relationship between Massachusetts and Pan Am.

In 1976, the MBTA acquired certain railroad property from Conrail, Pan Am's predecessor. Under the deed that transferred that property, the MBTA took ownership of the right of way, and assumed maintenance and dispatching obligations, but Pan Am retained the right to run freight service. The deed required Pan Am to pay a car-mile fee to compensate the MBTA for Pan Am's share of the maintenance and dispatching costs. Since 1976, the MBTA and Pan Am and its successors have shared the right of way.

In 2010, the FTA gave preliminary approval for a \$50 million TIGER grant to expand commuter rail service on the MBTA's Fitchburg line to Wachusett Station, approximately five miles north of the current terminus at Fitchburg Station. The right of way between Fitchburg and Wachusett is owned by an affiliate of Pan Am Railways, so the MBTA began working with Pan Am on a trackage rights agreement to accommodate the expansion.

Rather than just negotiate an agreement for the extension, the parties sought to reach a wider-ranging deal that would allow the MBTA to expand commuter rail service on Pan Am's right of way network in Massachusetts and New Hampshire. A more comprehensive agreement would set forth the terms for future commuter rail expansions, and eliminate the need to spend time and expense negotiating individual deals for each segment of track on which the MBTA might in the future elect to run service. A global trackage rights deal would provide the MBTA with certainty that it could exercise trackage rights for future expansions, and knowing the terms of that agreement in advance would greatly facilitate long-term rail planning in Massachusetts.

The Business Deal

For Pan Am, its long-term relationship co-existing with the MBTA's commuter rail trains on shared tracks made the deal worth considering, provided that the terms of the future shared use of the right of way were acceptable, and that Pan Am received business benefits in return. Ultimately, the parties agreed that in exchange for the MBTA obtaining rights to Wachusett, which would be implemented immediately to access the TIGER grant, and rights to other properties, the MBTA would relieve Pan Am of the obligation to pay trackage rights fees on the separate properties that are subject to the 1976 Deed. Pan Am therefore received cash benefits up front and for the duration of the deal, while the MBTA received expansive trackage rights that it could exercise in the future.

Specifically, the MBTA received immediate rights to operate non-revenue service over Pan Am-owned right of way. Such properties are called "Level 1 Rail Properties." In connection with the future expansion of commuter rail service, the MBTA can, after studying the infrastructure needs of the new service and constructing necessary right of way improvements, convert those properties to "Level 2" and implement commuter rail service while Pan Am retains ownership of the line. Or, the MBTA may in the future exercise an option to purchase the right of way property, which triggers an appraisal and sale by Pan Am to the MBTA at the appraisal price and converts the properties to "MBTA Rail Properties." The properties covered by the deal are:

- Freight Main Line to Plaistow NH (allows relocation of the Bradford layover including a station stop in Plaistow
- Freight Main Line to Wachusett Station and Layover;
- Freight Main Line from the MBTA's Haverhill line in Andover to the MBTA's Lowell Line in Lowell;
- The Freight Main Line from the MBTA's New Hampshire Main Line in Chelmsford to the MBTA's main line in Ayer/Littleton;
- The Worcester Main Line from the MBTA's Fitchburg Main Line in Ayer to the Worcester Union station.

In a separate deal related to a land disposition agreement involving the North Point development located on the municipal boundaries of Boston, Cambridge, and Somerville, the MBTA will acquire rights to the New Hampshire Main Line from the Massachusetts state line to Concord, NH.

Resolution of Trackage Right Issues – Pan Am

Once the business deal was struck, the MBTA and Pan Am sought to resolve the difficult issues that face every commuter rail authority seeking to expand service over freight-owned lines. The three categories of trackage rights that the MBTA would acquire each had its own set of resolutions. The parameters of the trackage rights deal are described below.

- <u>Operating Rights and Windows</u>: While the properties remain Level 1, the MBTA's non-revenue usage must not interfere with Pan Am's use of the property for freight service. When the MBTA exercises its option to run commuter rail service on Level 2 rail properties or if it elects to purchase the properties, the MBTA can schedule passenger trains, in consultation with Pan Am and consistent with a feasibility study, and Pan Am's dispatching protocol must give priority to the MBTA's trains.
- <u>Maintenance and Dispatching</u>: If the properties remain Level 1 or Level 2, Pan Am retains ownership, as well as maintenance and dispatching responsibility. If the MBTA exercises its purchase option, it will provide maintenance and dispatching services. The maintaining party provides those services at its sole cost and expense, unless the other party requests a level of maintenance that exceeds the level that the maintaining party requires for its own service. In such event, the requesting party will pay the incremental cost of the enhanced maintenance standard.
- <u>Liability Allocation</u>: Liability allocation provided the usual set of challenges, and resulted in yet another unique resolution. Pan Am initially sought a "but-for" indemnification from the MBTA, but the MBTA insisted on a more fault-based approach.

  Ultimately, the parties agreed that for the Level 1 and Level 2 properties, the MBTA would agree to name Pan Am as an additional insured on its general liability insurance policies, and such insurance would respond to claims by third parties involving both MBTA and Pan Am above the MBTA's $7.5 million self-insured retention. For joint incidents within the self-insured retention, each party would be responsible for its own fault, except that the MBTA would indemnify Pan Am for Pan Am's negligence on claims above $3 million. Each party would be responsible for damage to its property or employees. If the MBTA purchases any of the properties, liability will be allocated based on the fault-based provisions of the 1976 Deed.

The liability deal allows both parties to keep in place their current insurance programs, but still provides a fault-based structure that will promote safety.

- Construction Coordination: When the MBTA elects to operate commuter rail service on the Pan Am properties, it must first undertake a feasibility study that will determine what improvements to the track, signals, and other infrastructure are necessary to accommodate the level of service that the MBTA plans to implement. Pan Am will perform the infrastructure improvements as force account work, and the parties will coordinate construction activities so as to minimize interference with Pan Am's freight operations.

CONCLUSION: LESSONS LEARNED IN MASSACHUSETTS

Recent commuter rail expansion deals in Massachusetts have faced the same basic set of issues and challenges. Those issues and challenges are familiar to commuter rail agencies in other states. Operating rights, control of maintenance and dispatching, liability allocation, and construction coordination all pose significant obstacles to commuter rail expansion. In Massachusetts, the resolution of each of those topics has varied based on the specific operating realities of the deal. But each deal depended on a commitment to the same set of negotiating principles.

Find a Business Deal that Works

The key ingredient to each successful deal was to start with a business proposition that made sense to the host railroad. In the CSX deal, the bridge reconstruction project will advance CSX's business interests. The expenditure of public funds on those projects makes sense for Massachusetts too, because the projects will result in the reconstruction of aging bridge infrastructure, will promote economic development by ensuring that the Commonwealth's transportation infrastructure facilities accommodate robust freight rail service, and ultimately will allow for the commuter rail benefits of the transaction. In the Rhode Island deal, the parties identified that state's ability to leverage federal funding as a key asset that could benefit the interstate service. In the Pan Am deal, the benefits to the freight railroad's bottom line of a credit toward trackage rights fees made the negotiations of future passenger rights palatable for Pan Am.

Massachusetts has learned, through years of negotiating these deals and others, that trackage rights issues cannot be overcome by addressing those issues alone. Host railroads need a business incentive before accepting any new or increased commuter rail service. Commuter rail agencies that attempt to force their public mission – no matter how laudable that mission is – on a host railroad will quickly encounter a different perspective on entitlement to the right of way. Commuter rail agencies must spend time and attention understanding the host railroad's business imperatives and concerns, and should work to generate solutions that advance the interests of both parties.

Be Creative – Don't Get Stuck on Precedents

For better or worse, each trackage rights deal is unique. There is no "market" standard for liability allocation or any of the other thorny issues that commuter rail agencies face in negotiating with host railroads. Since host railroads control a unique asset, they may or may not be persuaded to accept the terms of a recent deal governing a different asset. Each deal requires its own set of solutions, so flexibility, creativity and open-mindedness are the best paths to agreement. Whenever possible, commuter rail authorities should try to negotiate for both short-term rights that they know they need now, and for rights that will allow for further expansion in the longer term.

Patience and Progress

Recent successes in Massachusetts have validated a patient and incremental approach to finalizing complicated and important rail deals. The planning, operational, and legal considerations all require careful attention and thorough negotiation. But with a foundation built on a solid business proposition, and the development of mutual trust between the parties, trackage rights issues can be worked out. Whenever possible, commuter rail agencies should encourage their most knowledgeable operational managers to speak directly with their counterparts at host railroads; in each of these deals, the railroaders on each side arrived at solutions when the transportation planners and lawyers seemed at loggerheads.

In recent years, Massachusetts has had success by adopting a deliberate approach to deal negotiations, with the goal of generating constant forward momentum. Trying to negotiate every aspect of a comprehensive deal at the outset can be daunting. Amtrak and many of the freight railroads operate in many different states, and holding their attention on any one commuter rail expansion project can be challenging. But by advancing a deal one issue at a time, and focusing on key milestones, deals can gain momentum. Commuter rail agencies should seek to maintain steady, positive progress on these transactions; intractability is the main enemy of rail deals. When multiple issues – from easy ones to the most difficult – have been overcome, the parties have invested too much time, energy, and goodwill to turn away from the final hurdles in an agreement.

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