

CHSRA Freight Agreement Summary

Process for involvement of Freight Railroads in the California High Speed Rail Program

Achievements to Date

A well defined relationship between the California High Speed Rail Authority (CHSRA) and the freight railroads is critical to the successful implementation of the High Speed Rail Program. Given the scale and complexities of building the Nation's first High Speed Rail service, a series of memorandums of understanding and implementing agreements have been identified to ensure that the HSR Program objectives are clear and that the roles and responsibilities of both CHSRA and the freight railroads are understood and agreed upon.

There are two major freight railroads with operations within California, Union Pacific Railroad (UPRR), and the BNSF Railway Company (BNSF). The UPRR and the BNSF separately own, operate, maintain, and dispatches a significant network of freight rail routes that also host both intercity and commuter passage rail service. Both the UPRR and BNSF operate on their own right-of-way and under agreement on rights of way owned by public entities. It is important to emphasize that both UPRR and BNSF play vital roles in the national and state economies by maintaining and expanding their ability to move freight by rail, to serve the state's ports and other shippers and to help relieve the state's crowded highway network. The MOUs and agreements discussed below are in part to ensure that these critical freight rail functions are not impacted as a result of the development of the HSR Program.

The CHSRA and the freight railroads have agreed upon the basic agreements that need to be developed and executed between the CHSRA and UPRR and between the CHSRA and the BNSF. While there will be differences in the agreements drafted with the UPRR and with the BNSF in terms of how various issues are addressed because the freight railroads have different procedures and administrative policies, the agreements will accomplish similar objectives and will be executed in the same order. The first type of agreement that needs to be developed is a memorandum of understanding (MOU), which describes the relationship between CHSRA and the freight railroad with respect to the preliminary steps regarding the CHSRA plans and implementation of the



proposed project. These MOUs make it clear that the intent is for the CHSRA and the freight railroads to work together in good faith in the development of the proposed HSR program. The second type of agreement to be developed will be the reimbursement agreements, which will describe the planning design review services that CHSRA will request the Freight railroads to perform and the compensation to the freight railroads for the services requested. The third type of agreement that will be developed are “permits for right of entry” on to freight railroad property for the purpose of undertaking preliminary activities such as surveying and test boring. The last type of agreement is the engineering and construction agreement, which are critically important in that they describe the scope, schedule and budget for the purposed work as well as the detail administrative and operating procedures that the individual freight railroad requires are in place prior to the start of construction.

Agreement Contents

Memorandum of Understanding

The following provisions are included in the MOUs that CHSRA has executed with the UPRR and BNSF last year:

- That CHSRA is solely responsible for planning and implementing the Proposed Project and that these responsibilities include conducting all required environmental studies and obtaining all necessary permits prior to construction.
- That the Proposed Project may result in an alignment which would in some instances run adjacent to or pass under or over the existing freight alignment, but the two operations will in no instance operate on the same track.
- That CHSRA intend to execute separate agreements that will address all planning design-review services that the CHSRA requests of the freight railroads, including compensation for such services. The CHSRA and the individual freight railroads contemplate negotiating one or more definitive agreements which may include:
 - Agreements for the sale to CHSRA of easements or other interests in freight railroads property or operating corridors,
 - Construction/relocation agreements concerning the initial construction of the system on freight railroad property or operating corridors,



- Other such agreements as the Parties determine are necessary.
- That the definitive agreements will have mechanisms to ensure that CHSRA has sufficient funds to reimburse the freight railroads for any costs that the freight railroads incur in connection with the initial design and construction of the proposed Project or modifications that must be made by the freight railroads for improvements that would be necessary in order to accommodate the proposed HSR Project. Further, because such funding would likely include funds from federal and other grants, the definitive agreements will describe which, if any, requirements associated with such grants received by CHSRA apply to the freight railroads and in what manner. The CHSRA shall give the freight railroad the opportunity to review and comment on all future agreement between CHSRA and a federal agency that reflect terms that may be expected to flow down to the freight railroads.
- That the Parties will work in good faith and maintain ongoing communications concerning the Proposed Project throughout the preparation of the CHSRA's technical studies, reports, and environmental documents, and during other activities related to development of the proposed Project.

Reimbursement Agreement

The following are examples of the type of provisions include in the reimbursement agreement that CHSRA has presented to the freight railroads for the express purpose of having the freight railroads review of CHSRA's design drawings for the Project to ensure compliance with freight railroad standards and other requirements:

- **Scope of Services** - the freight railroad will review the Project's design drawings to ensure compliance with its standards and other requirements (the "Services"). The Services may be performed directly by the freight railroad or by a subcontractor. CHSRA will use a task-based request system that identifies the specific Services it desires. Each task order will include a task order number that the freight railroad will reference on its invoices. Each task order will include a defined scope of work, identify any contractor, or sub consultants the freight railroad intends to use, and be countersigned by CHSRA and the freight railroad. The freight railroad will provide CHSRA with approval of the Project drawings when compliance is achieved.



- **Fees and Payments** - CHSRA will process invoices and make payments in compliance with the requirements of the California Prompt Payment Act, Government Code §927 et seq.
- **Record Keeping and Audits** - For a period of three years following freight railroad's issuance of its last bill for Services, the freight railroad will maintain all records related to Services that it seeks reimbursement from CHSRA under this agreement. These records will be available for review, copy, and audit by CHSRA, the Department of General Services, and the Bureau of State Audit.
- **No Approval** - Nothing herein is meant to be or will be construed to be an expression of approval of the Project by the freight railroad. Likewise, nothing herein obligates the freight railroad to convey any real property interests to CHSRA or to provide any other services or assets in relation to the Project.
- **Confidential and Proprietary Information (C&PI)** - To the extent allowed by law, CHSRA agrees to treat as confidential all information, in whatever form or medium, furnished or disclosed by freight railroads, or any of its agents, to CHSRA. C&PI excludes information already known or developed by CHSRA other than through a breach by CHSRA of any of its obligations hereunder or from a third party known by CHSRA to be breaching a confidentiality duty to the freight railroad. In the event CHSRA is required by law, regulation, or legal process to disclose any CP&I, CHSRA agrees to:
 - Give the freight railroad advance notice prior to disclosure so it may contest the disclosure or seek a protective order, and
 - Limit the disclosure to the minimum amount that is legally required to be disclosed.
- **Warranty** - The freight railroad makes no warranties of any kind, express or implied, with respect to the Services, including, without limitation, the warranty of fitness for a particular purpose or the accuracy or completeness of any information it provides to CHSRA. Notwithstanding the freight railroad's provision of the Services, CHSRA remains solely responsible for planning and implementing the Project, including the reasonableness of all design features.



- **No Agency Relationship** - the freight railroad is an independent contractor for all purposes and is entitled to no compensation from CHSRA other than that provided by this agreement. The freight railroad, its employees, and officers will not hold themselves out either explicitly or implicitly as officers, employees, or agents of CHSRA for any purpose whatsoever, nor are they authorized to do so.
- **State Certifications** - CHSRA acknowledges that the freight railroad is an interstate freight railroad with common carrier obligations. As such, the freight railroad is subject to a system of federal regulations that supersedes state jurisdiction on certain subjects. CHSRA nonetheless asserts that the freight railroad is a contractor for purposes of state statutes that require contractors working for the state to certify their compliance with certain requirements. Subject to these facts, and without waiving any legal defenses to the applicability or enforceability of the state requirements, including federal preemption of state law, the freight railroad certifies that it is in compliance with the following requirements in its performance of the Services:
 - Nondiscrimination Program
 - Drug-Free Workplace
 - Expatriate Corporations
 - Domestic Partners
- **National Labor Relations Board** - Freight railroads are governed by the Federal Railway Labor Act, which preempts state labor laws. Nonetheless the freight railroad certifies its compliance, pursuant to Public Contract Code section 10296.
- **Subcontracting** - Nothing contained in this agreement will create any contractual relationship between CHSRA and any subcontractor hired by the freight railroad. The freight railroad is solely responsible for supervising and paying any subcontractor that it hires to perform work in relation to the Services.
- **Governing Law** - except on subjects preempted by federal law, this agreement will be governed by and construed in accordance with the laws of the State of California. Nothing herein is meant to be or will be interpreted to be a waiver of principles of legal preemption or preclusion that may apply to UPRR because of its status as a common carrier regulated by the federal government. Venue for any lawsuit arising



between the parties in relation to this agreement will be in the Superior Court of Sacramento County, California or the Federal Court of the Eastern District of California.

Permit for Right of Entry

A third party contractor is usually responsible for filing any permit request seeking the right of entry on to the freight railroad's property. While each freight railroad has its own procedures for how the permitting process is handled and what specific information is required there are common elements that need to be addressed, including:

- What is the purpose of the request for entry?
- What is the duration of the permit request?
- What is the specific location?
- What equipment will be involved?

In addition to this type of information there is usual a permit fee and significant insurance requirements for the contractors coming on the freight railroad's property. There are also requirements for various levels of Railroad Workers Safety training/certification depending upon the nature and location on the activity proposed. Finally, while the time to process a right of entry permit request can vary widely, the average time for processing a permit request is 30 to 45 days from the time that a properly submitted request is received.

Engineering and Construction Agreement

The standard engineering and construction agreement is very detailed and specific based upon the type of engineering and construction activities proposed. All contractors, in addition to complying with the federal general code requirements, must also be in full compliance with each freight railroads own procedures for how the freight railroad managers construction on or immediately adjacent to the freight railroads property. While it would not be practical to try to even summarize the requirements for an engineering and construction agreement at this time, a listing of some of the issues that are included in these types of agreements is provide below:

Construction and Contractor Requirements

All work must be performed



- In a good and workmanlike manner,
- In accordance with the applicable Approved Plans
- In conformance with applicable building codes and applicable engineering, safety and other laws,
- In accordance with the highest accepted industry standards of care, skill and diligence
- In such a manner as shall not adversely affect the structural integrity of maintenance of the freight railroad's improvements, any structures on or near the freight railroad property, or any lateral support of structures adjacent to or in proximity of the freight railroads property,
- Each portion must be promptly commenced and diligently prosecuted to conclusion in its logical order and sequence.

Safety

During any work described in the agreement, each party, at its sole cost, shall perform all activities and work on or near the freight railroad's property in such a manner as to preclude injury to persons or damage to property and shall ensure that there is no interference with the railroad operations. Prior to entering all non-freight railroad contractors shall comply with the freight railroad applicable safety and security rules and regulations and complete the safety and security orientations within one year prior to entering the property.

The freight railroads will have the right to stop work if any of the following events take place:

- If the freight railroad determines that proper supervision and inspection is not being performed
- Contractors performs any work in a manner contrary to applicable approved plans
- Any contractor prosecutes its work in a manner that is hazardous to the freight railroad property, facilities or to the safe movement of railroad traffic
- The insurance required is canceled or expires.



Other Engineering and Construction Agreement Provision Topics

- Flagging requirements
- Unauthorized Test or Digging
- Drainage
- Liens
- Environmental Compliance and Notification
- Joint Working Group
- Reimbursement of Expenses
- Taxes
- Confidentiality
- Unforeseen Events
- Method of Invoicing and Payment
- Inspections
- Employees, Contractors and Labor Agreements
- Non Compliance
- Rolling Stock Safety
- Police and Security
- Regulatory Approvals
- Insurance, Maintenance of Liability Protection
- Subrogation Rights
- Liability and Indemnification for Loss or Damage
- Survival of Liability and Indemnifications
- Allocation of Environmental Tort Liability
- Notice of Releases of Hazardous Materials
- Releases and Indemnification
- Defaults
- Rights Upon Termination
- Dispute Resolution, Arbitration
- Force Majeure

Table 1: Accomplishments to Date

Agreement	Status
UPRR / CHSRA Memorandum of Understanding	Executed
BNSF / CHSRA Memorandum of Understanding	Executed
UPRR / CHSRA Reimbursement Agreement	Executed
Southern California Regional Rail Authority/CHSRA Reimbursement Agreement	Executed
Orange County Transportation Authority Reimbursement Agreement	Executed

Table 2: Agreement Completion Schedule

UPRR MOU on blended service (special requirement)	July 1, 2012
UPRR Engineering and Construction Agreement	September 1, 2012
Design Builder Begins Coordination with UPRR	March 1, 2013
BNSF Right of Way Identification and Planning Agreement	September 1, 2012
BNSF Engineering and Construction Agreement	January 1, 2013
Design Builder Begins Coordination with BNSF	March 1, 2013

