



## FDM 17-55-1 General

August 15, 2019

### 1.1 Background

Highway improvement proposals that require work on the railroad right of way either in crossing or closely paralleling a railroad require negotiations with the railroad. Like negotiations for railroad force account work, most WisDOT negotiations with railroads on property matters are handled by the Railroad and Harbors Section (RHS).

The area where roadways cross railroads should be viewed as “common areas” because, as a practical matter, public use and necessity require that both be there. Since both occupy the area, both have rights and obligations. When one party undertakes activities that affect (or damage) the other, that party is obligated to coordinate, protect, and perhaps reimburse the other.

The basic operating right of way for railroad main tracks is generally 50 feet or 25 feet each side of a single track, or 25 feet outside of multiple tracks. Railroad right of way is often 100 feet wide, plus extra widths are often needed for cuts and fills.

Unless evidence exists to the contrary, roadway right of way is assumed to be 66 feet wide per s.80.01(2) WS.

### 1.2 Entering Railroad Lands

Entry onto railroad lands is frequently necessary early in the project development process. WisDOT and its authorized representatives have legal authority to enter private railroad property to make surveys and inspections pursuant to 84.01(10) W.S. The railroad has no right to bar entry of WisDOT or its contractors to make surveys, inspections, measurements or take photographs, however they often seek to require WisDOT and its contractors to obtain a right of entry permit. **Any such permit is not required.** However, it is necessary to respect railroad operations. Refer to [FDM 9-10-6](#) for details on how to proceed and for a sample letter.

### 1.3 Indemnification

Railroads often want the WisDOT to indemnify them (assume their risk) if WisDOT enters onto their lands. The state cannot indemnify the railroads, but may indemnify WisDOT employees subject to statutory limitation. To do this, WisDOT has used the following language:

*“The Department agrees, as required by Wisconsin law, to pay any liabilities arising out of the exercise of its rights of entry whenever those liabilities result from an act or omission of a State of Wisconsin officer, employee or agent acting within the scope of his or her State of Wisconsin authority.”*

There are several reasons why WisDOT cannot agree to “hold harmless” or to indemnify third parties;

1. Such agreements conflict with Wisconsin’s Constitution, Article VIII, Sections 2, 3 and 4. WisDOT cannot pledge the credit of the state or contract state debt for payment of indemnification agreements.
2. The State of Wisconsin enjoys sovereign immunity, except as specified by the State Legislature, and no employee or officer may waive sovereign immunity without specific statutory authority to do so.
3. No state agency, without express legislative authority, can enter into a contractual indemnification agreement. State agencies must find any authority in the four corners of the statute book; if there is any doubt, the authority does not exist.

**Bottom Line: Neither WisDOT, nor its employees, have authority to sign an agreement of any kind to indemnify a railroad no matter how qualified or restricted or conditional.** Signing indemnification agreements for WisDOT without authority would be outside the scope of an employee’s or agent’s authority.

## FDM 17-55-5 Acquisitions

August 15, 2019

### 5.1 Background

Railroads have typically claimed to have ownership, (or at least superior title) of lands they occupy. As such, they seek compensation when highway improvements or other non-rail activities result in requests to use a portion of their property. In some instances, it may be found that the roadway occupied the area first and thus

has superior title.

Prior to determining compensation that is due a railroad, first evaluate the ownership claimed to be held by the railroad. A title search back to the original conveyance or patent may be required in some situations.

Since title search work is expensive and time consuming, the approximate value and overall significance of the proposed right of way taking should first be evaluated. If the taking is small, the value modest, and its significance or value to the railroad is small, it may be possible to negotiate acceptable compensation without a title search.

The Region first provides the RHS with a description of the parcel, the area of taking and the unit value. RHS will then arrange for acquisition of the appropriate interest. See the RHS Railroad Coordination Handbook for more detailed information.

## 5.2 Acquisition

Interests in railroad property are usually acquired in easement through negotiation. Railroad facilities will usually remain on the highway parcel to be acquired. RHS will follow the procedures outlined in the Real Estate Program Manual and Railroad Coordination Handbook in negotiating for the parcel and shall furnish the railroad with a copy of the "The Rights of Landowners Under Wisconsin Eminent Domain Law", and a copy of "Property Owner Appraisal Guidelines."

## 5.3 Administrative Revisions

This is a term used to describe a mutually acceptable payment for land and interests usually as the result of a counter offer from the railroad. It will typically be after the railroad's rejection of the WisDOT's latest offering price and will usually be a value exceeding the appraisal. In proposing an administrative revision, several factors must be considered as noted in the Real Estate Program Manual. These include:

- uncertainty of compensability for damage/benefits,
- adequacy of appraisal,
- divergence of opinion among appraisals,
- serious doubts as to highest and best use,
- complex valuation problems, and
- recent court or jury awards.

## 5.4 Eminent Domain and Condemnation

WisDOT has the right to condemn railroad property in cases where the public good is served. The right is used sparingly, as a negotiated settlement is the preferred option. If, after extensive negotiation, the easement for the crossing cannot be obtained, a Jurisdictional Offer and a "Notice of Lis Pendens" would be made. The interest in the railroad is then acquired by the Award of Damages conveyance. The award is often based on an amount established as just compensation by the appraisal.

*Note: As noted earlier, in order preserve WisDOT's rights under eminent domain, required land interests must be shown on a plat. Refer to [FDM 12-1-15](#) and [FDM 12-5-1](#) for a description of types of acquisition and determining right-of-way needs.*

## FDM 17-55-10 Responsibilities for Acquisitions

August 15, 2019

### 10.1 Railroads and Harbors Section (RHS)

RHS will acquire railroad land interests. WisDOT must handle acquisition whenever state or federal funds are used either for acquiring highway right of way for project construction under any of the following conditions:

1. A land right is required for joint use of railroad lands for transportation purposes on a state trunk highway such as for an at-grade crossing, a grade separation, a culvert installation, lateral encroachments, etc.
2. There is an agreement with the local highway agency for WisDOT to acquire right-of-way for the local road project.

### 10.2 Region

Region's early identification of any possible need for railroad property is imperative. Without early identification and subsequent notice to RHS, the project may not meet the desired schedule.

In the case of stipulated agreements for structures, RHS will define in the stipulation the land interest to be acquired from plat information provided by the Region. The Region will arrange for the appraisal if necessary.

The Region or project manager will provide RHS with the following information to proceed with negotiation:

- a schedule of highway interests and a legal description
- a Transportation Project Plat
- portions of the plan with cross sections, where appropriate
- an opinion of value via an appraisal, sales study or Project Data Book

Where long reaches of road embankments or slopes are located on railroad right of way, a permanent limited easement may be required. Before agreeing to such occupancy on mainline right of way, the railroad may want assurance that the highway occupancy will not preclude future track construction. Cross sections need to be developed up to at least the near rail of existing track.

### 10.3 Local Agencies

Normally, RHS will deal directly with railroads when it is necessary to make arrangements for adjustment of railroad facilities by railroad forces when state or federal funds are used on a highway project. However, agencies of a local unit of government may negotiate directly with the railroad in cases where it is financially responsible for acquiring the right-of-way on a local road or street project. If federal highway funds are to be used in financing the right of way or subsequent phases of the project, the acquisition of the right of way and any other project arrangements must be in compliance with federal and state regulations and procedures and the local agency must review the proposed offer with the Region and RHS prior to submitting it to the railroad.

## FDM 17-55-15 Determining Compensation

August 15, 2019

### 15.1 Procedure for Determining Compensation

Compensation for right-of-way damages is generally determined to be minimal for most railroad crossing projects but may be significant in other situations. However, railroads often have minimum acceptable levels of compensation, and legal and processing fees. Because railroad property is unique, it is highly recommended that every railroad parcel be appraised to substantiate the compensation being offered. A procedure has been developed to determine reasonable and just compensation for acquiring highway easements, temporary limited easements, and permanent limited easements for projects.

### 15.2 Easement Valuation

The following procedure is provided as a means of determining the amount of compensation for state trunk highway easements across railroad right of way without the necessity of a full appraisal of the parcel. If this method results in a value exceeding \$5,000, then a full appraisal is required, and a determination should be made that the railroad has good title to the property.

The procedure as outlined below is based on the principle that the new or revised crossing area will be used for the mutual but not necessarily equal benefit of the public and the railroad company.

### 15.3 Region, in Consultation with RHS if necessary

1. Determines whether the area of the existing highway right-of-way over and across the railroad right of way was acquired, dedicated or presumed according to Section 80.01(2) Wisconsin Statutes. This area is to be shown on the right of way plat as existing highway right-of-way.
2. Determines the area required for the new or additional highway easement.
3. Estimates the unit value of the land adjacent to the railroad property. This should be done by a Region real estate agent knowledgeable of land values in the area of the crossing. This amount will be the basic unit value where the railroad lands are comparable and could be similarly used by the abutting landowner. Where the railroad lands are not readily suitable for use with adjacent lands without substantial alterations, this condition should be reflected in an adjustment of the basic unit value of the railroad lands. (Examples of unsuitable land are locations where the land is too high or too low, contains a drainage ditch, is under water, is in close proximity to public highway, etc.).

### 15.4 Railroads and Harbors Section

1. Based on the adjusted unit values determined, compute the land value for the highway easement. If the value exceeds \$5,000, a full appraisal should be obtained, and a determination made that the railroad has good title to the property as a basis for an offer to the railroad, and as a basis for considering an administrative revision later if necessary.
2. An offering price report is prepared for approval by the Administrator.

This valuation procedure does not necessarily preclude the desirability of an appraisal.